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Status: GRANTED

Title: American National Red Cross, Petitioner  
v.  
S.G. and A.E.

Docketed:  
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Court: United States Court of Appeals  
for the First Circuit

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Entry	Date	Note	Proceedings and Orders
1	Oct 1 1991	G	Petition for writ of certiorari filed.
2	Nov 1 1991		Brief of respondent S.G. and A.E. in opposition filed.
3	Nov 6 1991		DISTRIBUTED. November 27, 1991
4	Nov 12 1991	X	Reply brief of petitioner American National Red Cross filed.
5	Nov 27 1991		Petition GRANTED. *****
6	Nov 27 1991	G	Motion of petitioner to dispense with printing the joint appendix filed.
7	Dec 16 1991		Motion of petitioner to dispense with printing the joint appendix GRANTED.
8	Jan 2 1992		SET FOR ARGUMENT TUESDAY, MARCH 3, 1992. (1ST CASE)
9	Jan 10 1992		Brief of petitioner American National Red Cross filed.
10	Jan 13 1992		Brief amicus curiae of United States filed.
11	Jan 15 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
14	Jan 17 1992		Record filed.
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13	Jan 24 1992		CIRCULATED.
12	Jan 27 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
15	Feb 3 1992		Record filed.
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16	Feb 11 1992	X	Brief of respondents S.G. and A.E. filed.
17	Feb 11 1992	X	Brief amicus curiae of Association of Trial Lawyers of America filed.
18	Mar 3 1992		ARGUED.

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No.

Supreme Court, U.S.  
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In the Supreme Court of the United States

OCTOBER TERM, 1991

AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E., RESPONDENTS

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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### **QUESTION PRESENTED**

Whether 36 U.S.C. § 2, which provides that the American National Red Cross has the right "to sue and be sued in courts of law and equity, State or Federal," vests federal courts with original jurisdiction over actions to which the Red Cross is a party, so that the Red Cross may remove to federal court under 28 U.S.C. § 1441(a) and (b) a tort action brought in state court.



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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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No.

AMERICAN NATIONAL RED CROSS, PETITIONER

*v.*

S.G. AND A.E., RESPONDENTS

---

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit**

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## **PETITION FOR A WRIT OF CERTIORARI**

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The American National Red Cross respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

### **OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 938 F.2d 1494. The opinions of the district court (App., *infra*, 18a-30a) are unreported.

### **JURISDICTION**

The court of appeals entered its judgment on July 24, 1991 (App., *infra*, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



## STATUTORY PROVISION INVOLVED

Section 2 of the American National Red Cross charter, 36 U.S.C. § 2, provides, in relevant part, that the American National Red Cross “shall have \* \* \* the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States.”

## STATEMENT

Respondents, a husband and wife, sued the Red Cross in March 1990 in the Superior Court of Merrimack County, New Hampshire. They alleged that the wife became infected with human immunodeficiency virus (HIV), which causes AIDS, as a result of a transfusion of blood collected by the Red Cross.<sup>1</sup> The Red Cross removed the case to federal district court under 28 U.S.C. § 1441, contending that the court had jurisdiction under 36 U.S.C. § 2. The district court agreed that federal jurisdiction existed and denied respondents’ motion to remand the case to state court. The court of appeals reversed while acknowledging that its decision conflicts with a recent decision of the Eighth Circuit.

### A. The Red Cross and Its Charter

This case involves the construction of a provision of the Red Cross charter, as amended in 1947, in light of *Osborn v. Bank of the United States*, 22 U.S.C. (9 Wheat.) 738 (1824), and subsequent cases. Construction of the 1947 amendments to the charter is

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<sup>1</sup> Respondents simultaneously moved to consolidate this case with pending cases against the wife’s surgeon and the manufacturer of an allegedly defective surgical stapler. When the Red Cross removed the case to federal court, the state court had not yet ruled on the motion to consolidate.

aided by an understanding of the background of the Red Cross.

Since 1864, several Geneva Conventions have provided for neutral persons from various nations to provide relief for the sick and wounded in times of war. See 36 U.S.C. § 1 note; 36 U.S.C. § 3; *Department of Employment v. United States*, 385 U.S. 355, 359 & n.8 (1966). In 1881, what is now known as the American National Red Cross was formed to serve that function. See 36 U.S.C. § 1 note. The Red Cross was reincorporated several times and was granted its first congressional charter in 1905. Congress in 1905 “believed that the importance of the work demands a repeal of the present charter and a reincorporation of the society under Government supervision.” *Ibid.* Under the 1905 charter, the Red Cross was formally assigned various peacetime duties in addition to its military-related duties, including disaster relief and prevention. See 36 U.S.C. § 3; *Department of Employment*, 385 U.S. at 359; Harriman Committee Report 4-5, C.A. App. 101-102.<sup>2</sup>

The 1905 charter empowered the Red Cross “to sue and be sued in courts of law and equity within the jurisdiction of the United States.” Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600. That charter unquestionably created original federal jurisdiction over all

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<sup>2</sup> The Harriman Committee Report, formally entitled *Report of the Advisory Committee on Organization* (June 11, 1946), was prepared by a distinguished committee appointed by the Chairman of the Red Cross to recommend changes to the charter and by-laws of the Red Cross. See also App., *infra*, 12a. Its recommendations were the acknowledged basis of Congress’s 1947 amendments to the Red Cross charter. S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947).

cases involving the Red Cross, because (the sue-and-be-sued clause aside) *all* federally chartered corporations at that time were automatically within the jurisdiction of the federal courts. The then-prevailing law of original federal jurisdiction was stated in the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), which held that the fact of federal incorporation, by itself, conferred on the federal courts jurisdiction over all cases involving federally chartered corporations. This grant of federal jurisdiction over all Red Cross cases became less clear in 1925, when Congress overruled *Pacific Railroad* by passing what is now 28 U.S.C. § 1349. That statute provides that “[t]he district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.”

It is unclear whether Congress intended Section 1349 to apply to the Red Cross, a non-stock corporation. What is clear is that Congress may confer federal jurisdiction over a corporation by specific charter language notwithstanding Section 1349. In *Osborn v. Bank of the United States*, *supra*, the Court held that a sue-and-be-sued clause making specific reference to federal courts conferred federal jurisdiction. The sue-and-be-sued clause at issue in *Osborn* gave the Bank the right “to sue and be sued \* \* \* in all state courts having competent jurisdiction, and in any circuit court in the United States.” 22 U.S. (9 Wheat.) at 817.

After the enactment of Section 1349, the Harri-  
man Committee (see note 2, *supra*) in 1946 recom-  
mended that the Red Cross charter be amended to  
“make it clear that the Red Cross can sue and be

sued in the Federal Courts” because “in view of the limited nature of the *jurisdiction* of the Federal Courts it seems desirable that this *right* be clearly stated in the charter.” Harriman Committee Report 35, 36, C.A. App. 132, 133 (emphasis added). Congress responded to that suggestion by simply adding the words “State or Federal” to the sue-and-be-sued clause, so that it now entitles the Red Cross “to sue and be sued in courts of law and equity, *State or Federal*, within the jurisdiction of the United States.” 36 U.S.C. § 2 (emphasis added). Neither the Senate nor the House report comments on the purpose of the amendment beyond endorsing the Harriman Committee Report, but Senator Walter George remarked at a hearing: “I think the purpose of the bill is very clear, and that is to give the jurisdiction in State courts and Federal courts, and I think we had better leave it there.” *American National Red Cross: Hearing on S. 591 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 10 (1947).

The Harriman Committee Report commented on the objectives underlying the whole enterprise of charter revision that was undertaken in 1946-1947. One was “recognition of the national stature of the Red Cross and of the national interests in aid of which the Red Cross now functions.” Harriman Committee Report 15, C.A. App. 112. The Report also acknowledged that the Red Cross is an “agency of the Government of the United States” for various purposes. *Id.* at 20, C.A. App. 117. This Court likewise has noted that, “time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross’ status virtually as an arm of the Government,” such that, despite some acknowledged “respects in which the Red Cross differs

from the usual government agency,” it is a “tax-immune instrumentalit[y] of the United States.” *Department of Employment*, 385 U.S. at 359-360; see also *United States v. City of Spokane*, 918 F.2d 84, 87 (9th Cir. 1990) (“there can be no doubt” that “the Red Cross is an instrumentality of the United States”), cert. denied, 111 S. Ct. 2888 (1991).

The question presented here is whether this important instrumentality of the United States, with a charter that unquestionably provided for removal to federal court when passed in 1905 and that was subsequently amended to make specific reference to the federal courts, may remove an action to federal court when it is sued in state court in a nondiversity case.

#### **B. Proceedings Below**

The Red Cross removed this case from New Hampshire state court to the federal district court pursuant to 28 U.S.C. § 1441(a) and (b). The district court denied respondents’ motion to remand, holding that the sue-and-be-sued clause in the Red Cross charter creates original federal jurisdiction and thus entitles the Red Cross to remove to federal court actions to which it is a party. App., *infra*, 23a-24a. The court relied on *Osborn v. Bank of the United States*, *supra*, in which this Court held that a parallel sue-and-be-sued clause that referred expressly to federal courts did confer federal jurisdiction. Although the district court recognized that “the courts are divided on this argument” (App., *infra*, 23a), it adhered to the “better-reasoned rule” finding *Osborn* applicable to the Red Cross (*id.* at 24a).

Concerned by the “conflicting decisions on the issue of jurisdiction over Red Cross” (App., *infra*, 28a),



the district court certified the issue under 28 U.S.C. § 1292(b) for an interlocutory appeal to the United States Court of Appeals for the First Circuit in an order dated June 19, 1990. App., *infra*, 26a-30a. The court of appeals accepted certification on September 13, 1990. See *id.* at 4a. It then reversed the district court's decision and ordered that the case be remanded to state court if diversity jurisdiction did not provide an independent basis for removal. *Id.* at 1a-16a.<sup>3</sup>

The court of appeals acknowledged that the question before it was not "easily decided" (App., *infra*, 15a) and that the Eighth Circuit, among other courts, had found original federal jurisdiction over the Red Cross in *Kaiser v. Memorial Blood Center*, 938 F.2d 90 (1991) (App., *infra*, 5a). The court of appeals also acknowledged that "it is easy to imagine that Congress would have conferred federal subject matter jurisdiction in cases by and against the Red Cross had the issue been presented." *Id.* at 16a. Nevertheless, apparently regarding the Red Cross charter as "ineptly drafted" (*ibid.*), the court "reach[ed] a different conclusion" (*id.* at 5a).

The court of appeals found this case closer to *Bankers Trust Co. v. Texas & Pacific Railway*, 241 U.S. 295 (1916), than to *Osborn*. App., *infra*, 7a-9a. In *Bankers Trust*, this Court held that a sue-and-be-sued clause that referred to "all courts of law and equity within the United States" was not a grant of jurisdiction to federal courts, but merely conferred the capacity to sue and be sued where jurisdiction

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<sup>3</sup> The district court has expressed its intention to allow joinder of nondiverse parties and remand the case to state court if it ultimately is determined that 36 U.S.C. § 2 does not provide original federal jurisdiction. App., *infra*, 28a.

was otherwise established. Although there is no specific reference to the federal courts at all in that clause (as there was in *Osborn* and is in the Red Cross charter), the First Circuit read *Bankers Trust* to turn on the failure of the clause to "mention a particular federal court (i.e., the circuit court)." *Id.* at 8a (emphasis added); see also *id.* at 10a. The First Circuit also found in *Bankers Trust*, and in 28 U.S.C. § 1349, a general rule "that a congressional grant of such jurisdiction should not be implied from ambiguous language." App., *infra*, 9a.

The court of appeals further distinguished *Osborn* on the ground that the charter in *Osborn* gave the Bank the power to "sue and be sued \* \* \* in all state courts having competent jurisdiction, and in any circuit court of the United States." 22 U.S. (9 Wheat.) at 817, *quoted in* App., *infra*, 9a (emphasis added by the First Circuit). The court reasoned that the presence of the phrase "having competent jurisdiction" in the portion of the *Osborn* charter dealing with state courts, combined with its absence from the portion of the charter dealing with federal circuit courts, justified reading the statute as one conferring jurisdiction on the federal courts. By contrast, the Red Cross charter refers to state and federal courts in a single clause without the phrase "having competent jurisdiction." The court deemed the "parallel" treatment of state and federal courts in the Red Cross charter sufficient to distinguish it from the one at issue in *Osborn*. *Id.* at 10a.

The court of appeals finally dismissed the legislative history of the Red Cross charter on the ground that it showed no "clear intent on the part of Congress to confer original jurisdiction." App., *infra*, 12a. The court acknowledged the reference to "juris-

diction" in the Harriman Committee Report but refused to accord it weight because the word is not used in the formal recommendation, the statutory amendment, or the Senate Report. *Id.* at 12a-14a. The court also noted that Congress could have made its intention to confer jurisdiction clearer and had in fact done so in other contemporaneous statutes. *Id.* at 14a-15a.

### **REASONS FOR GRANTING THE PETITION**

As the First Circuit acknowledged (App., *infra*, 5a), its decision in this case conflicts with *Kaiser v. Memorial Blood Center*, 938 F.2d 90 (8th Cir. 1991). At the district court level, conflicting decisions are proliferating rapidly in virtually all circuits, and the need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance, since there are systemic reasons why few of the district court decisions receive appellate review. Moreover, the decision below is erroneous, and the issue that it addresses is important.

#### **I. THE COURT OF APPEALS' INTERPRETATION OF 36 U.S.C. § 2 CONFLICTS WITH THE EIGHTH CIRCUIT'S INTERPRETATION AND AGGRAVATES THE EXISTING SPLIT OF AUTHORITY IN THE DISTRICT COURTS**

In *Kaiser*, the Eighth Circuit faced the same issue as the First Circuit did in this case. The Eighth Circuit held that the "specific reference to the federal courts" in the Red Cross charter is comparable to the charter language in *Osborn* and thus confers federal jurisdiction, making removal appropriate. 938 F.2d at 93. The First Circuit expressly rejected the Eighth Circuit's holding. App., *infra*, 5a.

The circuit split promises to fuel the disarray resulting from the district courts' attempts to grapple with this issue. More than 40 district court decisions have interpreted the Red Cross charter, roughly half concluding that it creates federal jurisdiction<sup>4</sup>

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<sup>4</sup> *Reisner v. Regents of the University of California*, No. CV-91-1252-JMI (JRx) (C.D. Cal. Aug. 22, 1991) (Ideman, J.); *Nacion v. West Hollywood Hospital*, No. 91-2411-MRP (GHK) (C.D. Cal. Aug. 19, 1991) (Pfaelzer, J.) (petition for interlocutory appeal filed Sept. 9, 1991); *Gillum v. Addis*, No. 91-293-TUC-RMB (D. Ariz. July 10, 1991); *Raybould v. American Red Cross*, No. H-91-754 (S.D. Tex. May 29, 1991); *C.G.W. v. Arcelona*, No. 91-662-C (E.D. Mo. May 23, 1991) (Cahill, J.); *Doe v. Alpha Therapeutic Corp.*, 763 F. Supp. 1039 (E.D. Mo. 1991) (Gunn, J.), permission to appeal denied, No. 91-8086EMSL (8th Cir. June 21, 1991); *Doe v. American Red Cross*, 763 F. Supp. 1084 (D. Or. 1991); *Doe v. Kerwood*, No. 91-CA-220 (W.D. Tex. Apr. 29, 1991), interlocutory appeal accepted, No. 91-9101 (5th Cir. July 19, 1991); *Andrea Y v. American Red Cross*, No. 90-6399-MRP (TX) (C.D. Cal. Feb. 25, 1991) (Pfaelzer, J.); *Brown v. Gartland*, No. 89-5496 (E.D. Pa. Feb. 16, 1990) (McGlynn, J.); *Doe v. American Red Cross*, No. 89-6281 (MRP), bench ruling (C.D. Cal. Dec. 18, 1989) (Pfaelzer, J.); *Rivera Gonzalez v. Commonwealth of Puerto Rico*, 726 F. Supp. 10 (D.P.R. 1989); *Sullivan v. Albany Medical Center Hospital*, No. 88-CV-1396, bench ruling (N.D.N.Y. June 26, 1989); *Irigoyen v. Kaiser Foundation Health Plan*, No. CV89-134 WMB (C.D. Cal. Feb. 13, 1989) (Byrne, J.); *Kaiser v. Memorial Blood Center*, 724 F. Supp. 1255 (D. Minn. 1989), aff'd, 938 F.2d 90 (8th Cir. 1991); *Anonymous Blood Recipient v. Sinai Hospital*, 692 F. Supp. 730 (E.D. Mich. 1988) (Gilmore, J.); *Conway v. St. Louis Children's Hospital*, 1988 WL 168580 (E.D. Mo. July 1, 1988) (Nangle, J.); *Evan v. Jewish Hospital*, 1988 WL 105639 (E.D. Mo. Mar. 28, 1988) (Filippine, J.); *C.H. v. American Red Cross*, 684 F. Supp. 1018 (E.D. Mo. 1987) (Harper, J.); *Smith v. Curators of the Univ. of Missouri*, 1987 WL 61205 (E.D. Mo. Apr. 2, 1987) (Harper, J.).

and half concluding that it does not.<sup>5</sup> This division of authority exists not only between different judicial districts, but sometimes within a single judicial dis-

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<sup>5</sup> *Doe v. Baystate Medical Center*, No. CA90-10094-Y (D. Mass. Sept. 4, 1991) (Young, J.); *Murphy v. St. Vincent Hospital*, No. CA90-12595-Y (D. Mass. Sept. 4, 1991) (Young, J.); *Hernandez v. County of Los Angeles*, No. 91-3182-SVW(EX) (C.D. Cal. Aug. 27, 1991) (Wilson, J.); *Doe v. American Red Cross*, No. 91-3114 (E.D. Pa. Aug. 23, 1991) (Ludwig, J.); *Doe v. Vanderbilt University*, No. 3-91-0244 (M.D. Tenn. July 23, 1991); *Goldstein v. American Red Cross*, No. 90-CV-60327-AA (E.D. Mich. July 11, 1991) (La Plata, J.); *Luckett v. Harris Hospital*, 764 F. Supp. 436 (N.D. Tex. 1991); *McEvilly v. Rush Presbyterian St. Luke's Medical Center*, 765 F. Supp. 434 (N.D. Ill. 1991); *Boutar v. American National Red Cross*, 1991 U.S. Dist. LEXIS 4590 (D.D.C. Apr. 9, 1991) (Greene, J.); *Ray v. American National Red Cross*, 1991 U.S. Dist. LEXIS 3963 (D.D.C. Mar. 25, 1991) (Penn, J.); *McCool v. American Red Cross*, 1991 U.S. Dist. LEXIS 2818 (E.D. Pa. Mar. 6, 1991) (J. Kelly, J.); *Carr v. American Red Cross*, 1990 U.S. Dist. LEXIS 14728 (E.D. Pa. Nov. 1, 1990) (Waldman, J.); *Stuart v. West Jersey Hospital*, No. 90-3744 (SSB) (D.N.J. Sept. 28, 1990); *Coccia v. American Red Cross*, 1990 U.S. Dist. LEXIS 13022 (E.D. Pa. Sept. 28, 1990) (Pollak, J.); *Jozdani v. American Red Cross*, No. CV 90-2321-WDK (Sx) (C.D. Cal. May 14, 1990) (Keller, J.), permission to appeal denied, No. 90-80232 (9th Cir. Sept. 6, 1990); *Torres v. Ortega*, No. C 8626 (N.D. Ill. Feb. 16, 1990); *Doe v. American Red Cross*, No. 89 6282 (TJH) (C.D. Cal. Jan. 11, 1990) (Hatter, J.); *Doe v. American Red Cross*, No. CV 89-6284 RG (C.D. Cal. Jan. 10, 1990) (Gadbois, J.); *Doe v. American Red Cross*, 727 F. Supp. 186 (E.D. Pa. 1989) (Pollak, J.); *Zacccone v. American Red Cross*, No. C88-4458 (N.D. Ohio Dec. 15, 1989); *Collins v. American Red Cross*, 724 F. Supp. 353 (E.D. Pa. 1989) (Waldman, J.); *Leahy v. County of Los Angeles*, No. 89-5344 WDK (Gx) (C.D. Cal. Oct. 13, 1989) (Keller, J.); *Anonymous Blood Recipient v. William Beaumont Hospital*, 721 F. Supp. 139 (E.D. Mich. 1989) (Feikens, J.); *Osborne v. Hawkes Hospital of Mount Carmel*, No. C-2-89-440 (S.D. Ohio Aug. 25, 1989) (Smith,



trict itself. Whether a case is litigated in state or federal court thus depends not only on the state in which it is brought, but also on the fortuity of which judge within a federal district receives the case once it is removed.<sup>6</sup>

There is no realistic prospect for resolution of this far-reaching conflict without a decision by this Court. Any appellate decision hereafter will simply side with the Eighth Circuit or side with the First Circuit and, at best, shift the weight of authority in one direction or the other from its current rough equipoise. Moreover, the question rarely reaches the appellate level, as the current disproportion between appellate decisions (two) and trial-level decisions (more than 40) attests.

District court decisions to remand a case to state court are, ordinarily, "not reviewable on appeal or otherwise" (28 U.S.C. § 1447(d)), and the standards

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J.) ; *Vansant v. American Red Cross*, No. 88-8275 (E.D. Pa. June 30, 1989) (O'Neill, J.) ; *Smith v. Thomas Jefferson Univ. Hospital*, 1989 WL 73776 (E.D. Pa. Aug. 7, 1989) (Fullam, C.J.) ; *Okoro v. Children's Hospital*, 1988 WL 168531 (D.D.C. July 12, 1988) (Greene, J.) ; *Griffith v. Columbus Area Chapter of the American Red Cross*, 678 F. Supp. 182 (S.D. Ohio 1988) (Graham, J.) ; *Roche v. American Red Cross*, 680 F. Supp. 449 (D. Mass. 1988) (Keeton, J.) ; *Jeanne v. Hawkes Hospital of Mount Carmel*, 1988 WL 168542 (S.D. Ohio Jan. 29, 1988) (Graham, J.) ; *Walton v. Howard University*, 683 F. Supp. 826 (D.D.C. 1987) (Penn, J.).

<sup>6</sup> In the Central District of California, for example, Judges Byrne, Pfaelzer, and Ideman have held that the Red Cross charter confers federal jurisdiction, but Judges Hatter, Gadbois, Keller, and Wilson have held that it does not. In the Eastern District of Michigan, Judge Gilmore has found jurisdiction; Judges Feikens and La Plata have found none. See notes 4 & 5, *supra*.

for certification of interlocutory appeals under 28 U.S.C. § 1292(b) are exacting. See App., *infra*, 27a. Those factors combine to make appellate decisions of this issue a rarity. The First and Eighth Circuits, as noted, have decided the issue, and the Fifth Circuit has recently accepted the issue on interlocutory appeal in *Doe v. Kerwood*, No. 91-9101 (July 19, 1991). The D.C. Circuit, on the other hand, has rejected a district court's effort to certify the issue without first deciding it (*Ray v. American National Red Cross*, 921 F.2d 324 (1990) (per curiam)), and the Ninth Circuit, citing 28 U.S.C. § 1447(d), has rejected a district court's effort to certify the issue after deciding that the case should be remanded (*Jozdani v. American Red Cross*, No. 90-80232 (Sept. 6, 1990) (unpublished order)).

As a result of the difficulty of securing appellate review, trial courts will only rarely obtain guidance from the federal courts of appeals on this issue, and the opportunities for *this* Court to review the issue will be few. This case presents such an opportunity, and the Court should take it.

The decision below also creates conflicts that extend beyond Red Cross cases. The theory of the decision below is that a congressional charter that grants an instrumentality of the United States the right to sue and be sued in the federal courts, but "makes no reference to the jurisdiction of specific courts, either state or federal" (App., *infra*, 10a), does not create original federal jurisdiction. The Red Cross is not the only instrumentality of the United States whose sue-and-be-sued clause meets that description. For example, 12 U.S.C. § 1702 provides that the Secretary of Housing and Urban Development may "sue and be sued in any court of com-

petent jurisdiction, State or Federal.” The First Circuit necessarily would construe that clause as a mere grant of capacity to the Secretary, not a grant of jurisdiction to the federal courts. Yet the Fourth Circuit has held that “section 1702 \* \* \* confer[s] subject matter jurisdiction in the federal district court.” *Portsmouth Redevelopment & Housing Authority v. Pierce*, 706 F.2d 471, 475, cert. denied, 464 U.S. 960 (1983). Agreeing with that conclusion, the Solicitor General has advised this Court: “Plainly, Section 1702, by authorizing suit ‘in any court of competent jurisdiction, State or Federal,’ provides a basis for district court jurisdiction \* \* \*.” Brief for the Respondents in Opposition at 9, *Portsmouth Redevelopment and Housing Authority v. Pierce*, No. 83-90. The decision below therefore contradicts not only the Eighth Circuit’s holding with respect to the Red Cross charter, but also the view of both the Fourth Circuit and the federal government. The Court should grant certiorari to review these important conflicts.

## II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

This Court’s decisions teach how a sue-and-be-sued clause in a federal charter is to be interpreted: a specific reference to the federal courts is construed as a grant of jurisdiction. The First Circuit embraced a more complicated analysis that requires “mention [of] *a particular* federal court” (App., *infra*, 8a (emphasis added)) in order to find jurisdiction, but that analysis finds no support in this Court’s decisions. Moreover, the First Circuit erroneously disregarded the evidence of Congress’s intent to provide jurisdiction in *this* charter.

A. This Court has ruled consistently that an express reference to the federal courts in a federal cor-

poration's sue-and-be-sued clause creates federal jurisdiction over actions involving that corporation. The seminal and still controlling case is *Osborn v. Bank of the United States*, *supra*. In that case, the Bank's charter allowed it "to sue and be sued \* \* \* in all State Courts having competent jurisdiction, and in any circuit court of the United States." 22 U.S. (9 Wheat.) at 817 (emphasis added). This Court held that the provision "admit[ted] of but one interpretation" (*ibid.*), namely that the charter "confers jurisdiction on the circuit court of the United States, if Congress can confer it" (*id.* at 818). In reaching that decision, the Court distinguished an earlier case involving the Bank's predecessor, *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), on the ground that the charter in *Deveaux* referred only to "courts of record" (*id.* at 85) and did not specify the federal courts. The words that Chief Justice Marshall chose to distinguish between *Deveaux* and *Osborn* are important, for they reflect that it was the reference to *the federal courts* generally, not the reference to *a specific federal court*, that influenced the Court's decision:

Whether this decision [*Deveaux*] be right or wrong, it amounts only to a declaration, that a general capacity in the bank to sue, *without mentioning the courts of the Union*, may not give a right to sue in those courts. To infer from this, that words expressly conferring a right to sue in *those courts*, do not give the right, is surely a conclusion which the premises do not warrant.

22 U.S. (9 Wheat.) at 818 (emphasis added). Thus, *Osborn* established the principle that reference to the federal courts in a sue-and-be-sued clause creates federal jurisdiction.

In the *Pacific Railroad Removal Cases*, *supra*, this Court went well beyond *Osborn* by holding that the mere fact of federal incorporation creates federal jurisdiction over cases involving the corporation. Congress reacted by withdrawing federal jurisdiction based solely on a railroad's federal incorporation (Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803), and in 1925 extended that withdrawal to all federally chartered stock corporations (see 28 U.S.C. § 1349). The court below erred, however, in concluding (App., *infra*, 6a-7a) that Congress's nullification of *Pacific Railroad* undermined the holding of *Osborn*. To the contrary, Congress in no way limited *Osborn*'s vitality. The relevant holding in *Osborn* is grounded strictly in the charter language that referred to the federal courts, not in the fact that the Bank was federally chartered.

Subsequent case law confirms the validity of distinguishing between jurisdiction based on charter language and jurisdiction based on the fact of federal incorporation. In *Bankers Trust Co. v. Texas & Pacific Railway*, this Court again construed charter language that empowered a railroad to sue and be sued "in all courts of law and equity *within the United States*" but did not specify the federal courts. 241 U.S. at 302 (emphasis added). Because the language suffered from "the same generality" as the language in *Deveaux*, this Court held that the charter did not create federal jurisdiction. *Id.* at 304-305. The case does not, as the court of appeals suggested (App., *infra*, 8a-9a), rest on any general rule that ambiguous statutes will be construed not to grant jurisdiction or that mention of a *specific* federal court is required. It simply interprets a statute that



is wholly unlike the Red Cross charter and instead like the statute construed in *Deveaux*.

On the only occasion when this Court *has* confronted a sue-and-be-sued clause that refers specifically to the federal courts but not to any particular federal court, it has found the clause to be a grant of jurisdiction. In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 455 (1942), the Court wrote:

The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued "in any court of law or equity, State or Federal."

In an accompanying footnote, the Court noted that the quoted Act "further provides" that actions in which the FDIC is a party shall be deemed to arise under federal law, yet the Court made no comment on the significance of that fact. *Id.* at 455 n.2. The fact that the Court regarded as having jurisdictional importance was the one quoted in the text, *i.e.*, that the statute—exactly like the Red Cross charter—authorized suit "in any court of law or equity, State or Federal."

Justice Jackson, concurring, stated even more explicitly that the "arising under" language found in the majority's footnote had a substantive purpose (*i.e.*, directing the courts to fashion a federal common law) and that jurisdiction itself was conferred by the statute's reference to the federal courts:

This case is not entertained by the federal courts because of diversity of citizenship. It is here because a federal agency brings the action, and the law of its being provides, with exceptions

not important here, that: "All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: . . ." *That this provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision that the Corporation may sue and be sued "in any court of law or equity, State or Federal."*

315 U.S. at 467-468 (emphasis added and footnote omitted). The court below, by attempting to distinguish *D'Oench* on the theory that the "arise under" clause, not the sue-and-be-sued clause, was the jurisdiction-conferring feature of the statute (App., *infra*, 10a-11a), thus was not faithful to this Court's reasoning.

The court of appeals ignored the clear import of these precedents in ruling that 36 U.S.C. § 2 does not create federal jurisdiction. Indeed, the court dismissed the Red Cross charter's specific reference to federal courts—Congress's chosen method of conferring federal jurisdiction on corporations—as having no "talismanic significance." App., *infra*, 7a. Regardless of how the significance of the reference is characterized, *Osborn's* holding that such a reference constitutes an express grant of federal jurisdiction is surely controlling. Unlike the First Circuit, the Eighth Circuit recognized *Osborn's* authority and held that a reference to federal courts confers federal jurisdiction. *Kaiser v. Memorial Blood Center, supra*.

B. Resort to legislative history in this case should be unnecessary because of the clear reference to the federal courts in the Red Cross charter, which brings it within the rule of *Osborn* and *D'Oench*. Nevertheless, the legislative history strongly supports the Red Cross's position. The court of appeals sought to cir-



cumvent the legislative history (App., *infra*, 12a-15a), but its effort to do so—particularly its reliance on a comparison to other statutes—is unconvincing.

The Red Cross charter amendments were passed just five years after *D'Oench* and contained language almost identical to that which this Court found to be jurisdiction-conferring in the FDIC charter. One must, of course, presume that Congress intended those words to have the meaning that this Court had given them in similar legislation. *Cannon v. University of Chicago*, 441 U.S. 677, 695-698 (1979); see also *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988). But it is not necessary to rely on a presumption alone, for both the Harriman Committee Report, and one of the few Members of Congress who ever commented on this legislation, *expressly* stated its purpose to be jurisdictional. See pp. 4-5, *supra*. Furthermore, the “national stature” and governmental nature of the Red Cross were driving forces behind the 1947 charter amendments (*id.* at 5), and those policies support a construction of the charter that allows the Red Cross to remove lawsuits from state to federal court.

The court of appeals dismissed these explicit references to “jurisdiction” on the curious ground that they were not repeated elsewhere. App., *infra*, 12a-14a. The court found it significant, for example, that “the Senate Report makes no mention of the jurisdictional point whatsoever.” *Id.* at 14a. But the Senate Report is just two pages long (less than *one* full page of text) and says virtually nothing more than that the legislation incorporates the uncontroversial recommendations of the Harriman Committee Report. S. Rep. No. 38, 80th Cong., 1st Sess. (1947). In relying on a tenuous negative inference from that document and similar sources, the First Circuit was

grasping at straws. See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

The court below relied more heavily on the theory that Congress *could have* used more specific language to grant jurisdiction, and did so in a couple of statutes passed shortly after the amendment of the Red Cross charter. App., *infra*, 14a-15a. The negative inference from Congress's failure to use more specific language fails, however, because the language Congress chose lends itself even more poorly to the interpretation the court of appeals attributed to it. Congress could have used clearer language had it intended to achieve that result and did so in at least one contemporaneous statute.

The court of appeals was forced to conclude that the 1947 amendments to the Red Cross charter had the effect of "conferring only the power to sue." App., *infra*, 12a. But adding the words "State or Federal" to the 1905 charter was clearly unnecessary to achieve that end. The charter already empowered the Red Cross "to sue and be sued in courts of law and equity within the jurisdiction of the United States." Federal courts surely had been courts of law within the jurisdiction of the United States between 1905 and 1947. There was thus no need to single them out for this limited purpose when the charter was amended.

Furthermore, if Congress intended only to make clear the Red Cross's *capacity* to sue in state and federal courts, it could just as easily have given the Red Cross merely the power "to sue and be sued, to

complain and to defend in any court of competent jurisdiction," without explicit reference to the federal courts; and that is precisely what Congress did in reincorporating the Export-Import Bank of the United States on June 9, 1947, just a month after it amended the Red Cross charter. Act of June 9, 1947, ch. 101, § 1, 61 Stat. 130 (current version at 12 U.S.C. § 635(a)(1)). In short, Congress could have been clearer in achieving the result that the court of appeals postulated, just as it could have been clearer in conferring jurisdiction. The question presented must be answered by analyzing the language that Congress *did* use in the light of governing precedents, not by drawing negative inferences from the language that Congress *could have* used.

The court of appeals, moreover, misquoted in a significant way the statute that it regarded as the best evidence that the 1947 Congress did not intend a statute worded like 36 U.S.C. § 2 to grant jurisdiction. In August 1947, Congress passed a statute clearly conferring on federal district courts jurisdiction over cases in which the Federal Crop Insurance Corporation sues or is sued, and the court of appeals asserted that "Congress so amended the F.C.I.C. charter despite the presence of the language 'sue and be sued in any court, state or federal' in the corporation's original charter." App., *infra*, 14a.<sup>7</sup> The ac-

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<sup>7</sup> The court of appeals relied further on language in the charter of the Commodity Credit Corporation, also enacted *after* the amendments to the Red Cross charter, that conferred *exclusive* original jurisdiction on the federal courts. App., *infra*, 14a-15a (citing Act of June 29, 1948, ch. 704, § 4, 62 Stat. 1070). The court failed to appreciate that Congress naturally would use different language to create exclusive rather than concurrent jurisdiction.

tual language in the original FCIC charter, however, was quite different: "The Corporation \* \* \* may sue and be sued in its corporate name in any court of *competent jurisdiction*, State or Federal." Act of Feb. 16, 1938, ch. 30, § 506, 52 Stat. 73 (emphasis added). The "of competent jurisdiction" language—which is absent from the Red Cross charter—introduces a potential ambiguity that Congress may have wished to eliminate, since the earlier version might be read to presuppose that jurisdiction is determined by some body of law other than the sue-and-be-sued clause itself.<sup>8</sup> Since no such ambiguity has ever appeared in the Red Cross charter, the 1947 amendment of the FCIC charter cannot form the basis for any inference about the meaning of the 1947 amendment of the Red Cross charter, and the court of appeals erred by drawing such an inference.

The inference that the court of appeals would draw is wrong for the additional reason that it inverts the proper time sequence that should guide the interpretation of the Red Cross charter. Courts must look to "the state of the law *at the time the legislation was enacted*," and not to subsequently enacted laws, to interpret the meaning of statutory language. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982) (emphasis added). When Congress reincorporated the Red Cross in 1905, the *Pacific Railroad* doctrine was still valid. Thus, the mere fact of federal incorporation conferred federal jurisdiction on cases involving the Red Cross.

After the passage of 28 U.S.C. § 1349 in 1925, however, it appeared that jurisdiction could no longer

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<sup>8</sup> See *Califano v. Sanders*, 430 U.S. 99, 106 n.6 (1977). As noted above, however, the Fourth Circuit has held as recently as 1983 that even this language confers federal jurisdiction.



be predicated solely on federal incorporation. Congress thereafter amended the Red Cross charter to refer specifically to the federal courts in its sue-and-be-sued clause. This brought the Red Cross charter into line with the unbroken line of precedent holding such references to constitute an express grant of federal jurisdiction.

Accordingly, both the language of the statute, construed in light of law existing when it was passed, and the legislative history contradict the court of appeals' decision. This Court should grant the Red Cross's petition to resolve the conflict in the circuits and correct the First Circuit's error.

### III. THE QUESTION PRESENTED IS IMPORTANT

Justice Scalia has observed that "[n]othing is more wasteful than litigation about where to litigate." *Bowen v. Massachusetts*, 487 U.S. at 930 (dissenting opinion); see also *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818-819 (1988). With the lower federal courts hopelessly divided on whether the Red Cross may automatically remove cases from state to federal court, and the only two appellate courts to decide the issue in disagreement, no end to the widespread litigation of this issue is in sight unless this Court grants certiorari. Cases may continue to be erroneously remanded to state court, or (if our position turns out to be wrong) cases may proceed to trial in federal courts that have no jurisdiction; either way, the potential waste of resources is great. A decision by this Court would relieve the burden on the lower federal courts that must continue to grapple with this issue, and on the Red Cross.

The more than 40 decided AIDS-related cases that have addressed the jurisdictional issue are among the

many such cases that have been brought against the Red Cross. The court of appeals expressly cited the "importance of the jurisdictional issue" and the "increasing litigation" involving transfusion-associated AIDS as its reasons for granting the interlocutory appeal in this case. App., *infra*, 2a. Substantial resources have been and will continue to be devoted to this preliminary, procedural issue until it receives definitive resolution. Those resources necessarily are diverted not only from other important work of the courts, but also from other important work of the Red Cross itself.

Both Congress and this Court have recognized the importance of the services performed by the Red Cross. Congress reincorporated the Red Cross in 1905 to introduce direct federal supervision of and representation in the national organization because it "believed that the importance of the work" performed by the Red Cross demanded increased participation by the federal government. 36 U.S.C. § 1 note. This Court too has adverted to the "wide variety of functions indispensable to the workings of our Armed Forces around the globe, and \* \* \* to the States in time of need" that the Red Cross fulfills. *Department of Employment*, 385 U.S. at 359 (footnotes omitted). The Red Cross's blood services program, directly at issue in the increasing litigation, plays a central role in the performance of these crucial services. Indeed, in a recent opinion resolving the same question presented here in the same general context of AIDS-related litigation resulting from a blood transfusion, Judge Ideman of the Central District of California traced the relationship of the blood program to the national purposes for which the Red Cross was chartered and concluded that "[t]hose purposes may be thwarted if local or regional needs or prejudices are allowed to

bring undue pressure on the Red Cross[,] \* \* \* [which] could easily be brought to bear in trial situations in a local forum." *Reisner v. Regents of the University of California*, slip op. 4-6.

Resolution of the jurisdictional issue by this Court—and a decision favoring the federal forum—is also necessary in order to promote uniformity in the decision of certain federal questions that will arise repeatedly in AIDS-related tort suits as a result of the Red Cross's status as a federal instrumentality. Trial courts will need to decide, for example, whether the Red Cross shares the federal government's immunity from punitive damages<sup>9</sup> and from jury trial demands.<sup>10</sup> Whatever the correct resolution of those questions may be, they are *federal* questions that should receive *federal* determination. Cf. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 111 S. Ct. 1700, 1709 (1991) (complex issues of federal immunity may "need[] the protection of a federal forum"). Yet those questions will be entrusted to the state courts roughly half the time—on a virtually random basis—unless this Court grants certiorari and reverses the decision of the court of appeals.

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<sup>9</sup> See *Okoro v. Children's Hospital National Medical Center*, Civ. No. 5325-87, slip op. 7 (D.C. Super. Ct. May 30, 1989) ("A Federal instrumentality retains its immunity from punitive damages unless Congress explicitly authorizes liability for such damages. The statute creating the Red Cross did not provide such an explicit waiver.") (citation omitted).

<sup>10</sup> See *Lehman v. Nakshian*, 453 U.S. 156, 168 (1981); *In re Young*, 869 F.2d 158 (2d Cir. 1989) (United States Postal Service, as a federal instrumentality with a sue-and-be-sued clause, has immunity from jury trial demands); *Jones-Hailey v. TVA*, 660 F. Supp. 551 (E.D. Tenn. 1987) (same as to TVA).



Finally, review of the decision below is important because of the cloud it places over the jurisdictional provisions of statutes applicable to other federal agencies, officials, and instrumentalities. As already noted (p. 14, *supra*), the Solicitor General regards a sue-and-be-sued clause that refers to "any court of competent jurisdiction, State or Federal," as a grant of jurisdiction to the federal district courts. Other statutes, including those applicable to the Pension Benefit Guarantee Corporation, the Federal National Mortgage Association, and the Government National Mortgage Association, also contain that language or language sufficiently similar to be affected by the decision below (and do not contain language deeming all questions to arise under federal law).<sup>11</sup> Furthermore, Justice Jackson has cited 12 U.S.C. § 1432, applicable to Federal Home Loan Banks, as a jurisdiction-conferring statute indistinguishable from that of the FDIC. *D'Oench, Duhme*, 315 U.S. at 468 n.5 (concurring opinion). If the court below is right in demanding "mention [of] a particular federal court" (App., *infra*, 8a) to find jurisdiction, however, then the Solicitor General and Justice Jackson are wrong, and the previously assumed basis for federal jurisdiction over these entities is absent. This Court should

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<sup>11</sup> 12 U.S.C. § 1723a(a) (GNMA and FNMA); 29 U.S.C. § 1302(b) (1) (PBGC). The statute applicable to GNMA and FNMA, like 12 U.S.C. § 1702 and the pre-1947 FCIC statute, grants the power to sue and be sued "in any court of competent jurisdiction, State or Federal." The "of competent jurisdiction" language *weakens* the case for construing the statute as a grant of original federal jurisdiction (see p. 22, *supra*), yet statutes containing that language have been so construed. If that construction is proper, it follows *a fortiori* that the Red Cross charter, which lacks such language, confers jurisdiction.

resolve the uncertainty created by those conflicting views.

In sum, the authorities are in substantial disarray on a matter of importance to the courts, to the Red Cross, and to other components of the government. This case presents a rare opportunity for this Court to address the disputed jurisdictional issue and to bring much-needed certainty and uniformity to this area. Therefore, the Court should grant the petition.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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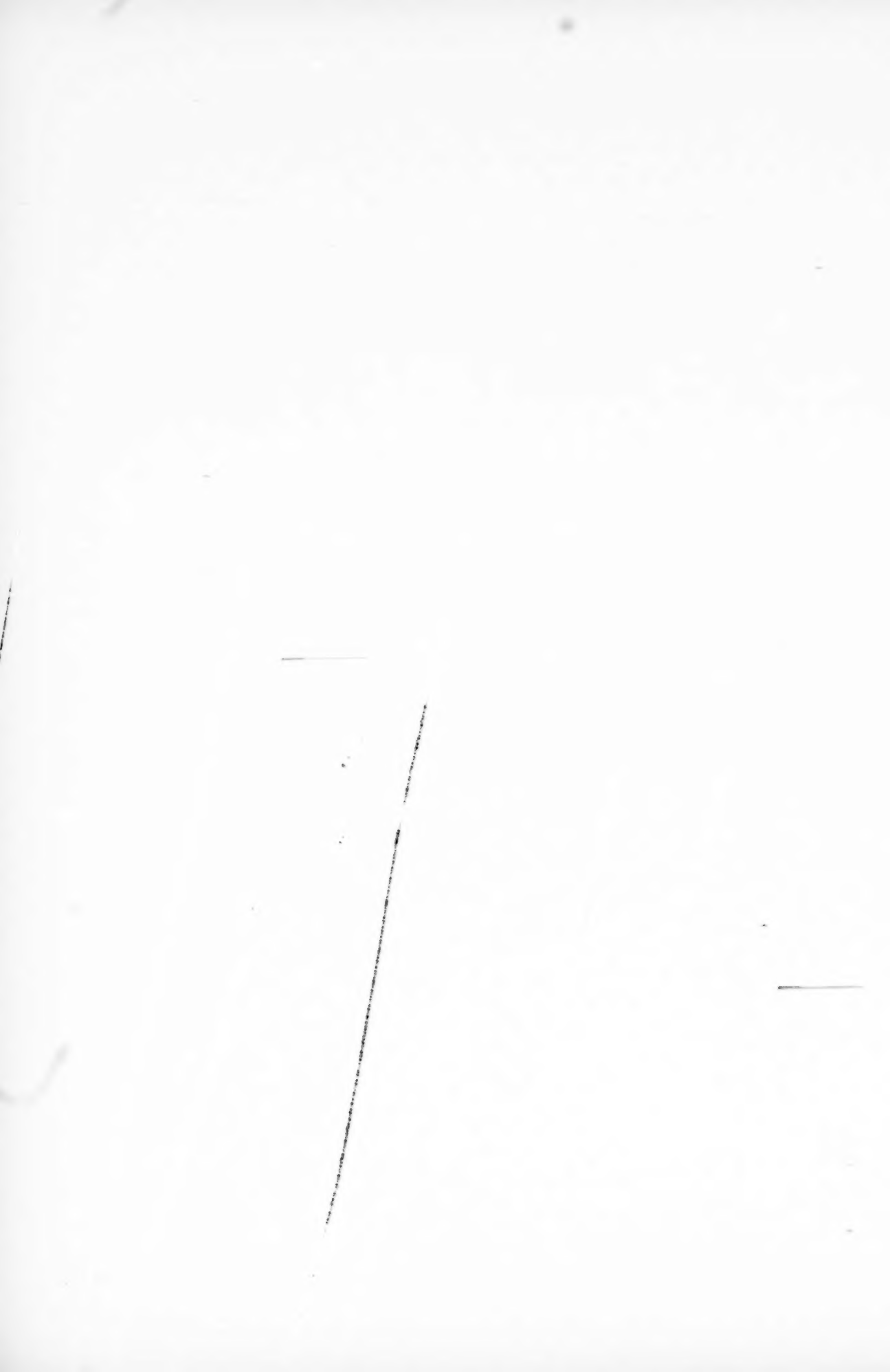
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OCTOBER 1991



# **APPENDICES**

## APPENDICES

1a

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 90-1873

S. G. and A. E.,  
PLAINTIFFS, APPELLANTS,

v.

AMERICAN NATIONAL RED CROSS,  
DEFENDANT, APPELLEE.

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Appeal from the United States District Court  
for the District of New Hampshire  
[Hon. Shane Devine, *U.S. District Judge*]

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Before  
Campbell, *Circuit Judge*,  
Coffin, *Senior Circuit Judge*,  
and Cyr, *Circuit Judge*.

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*Gilbert Upton* with whom *Gary B. Richardson* and  
*Upton, Sanders & Smith* were on brief for appellants.

*Edward L. Wolf*, Associate General Counsel,  
American National Red Cross, with whom *Bruce M.*



*Chadwick, Brendan Collins, Arnold & Porter, Irvin D. Gordon and Sulloway, Hollis & Soden* were on brief for appellee.

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July 24, 1991

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CAMPBELL, *Circuit Judge*. This appeal presents the question of whether the language of the congressional charter of the American National Red Cross, 36 U.S.C. § 2, confers original federal jurisdiction over all suits involving the Red Cross. Answering this question affirmatively, the district court denied the plaintiffs' motion to remand the case to state court but certified the question for immediate appellate review pursuant to 28 U.S.C. § 1292(b). Because of the importance of the jurisdictional issue presented, especially in light of the increasing litigation concerning the transmission of the HIV virus through the transfusion of tainted blood, we granted the plaintiff's petition for permission to appeal.

For the reasons set forth below, we hold that Congress's amendment of the Red Cross charter in 1947, as reflected in 36 U.S.C. § 2,<sup>1</sup> did not create original federal jurisdiction over all suits involving the Red Cross. Therefore, should the district court determine that joinder of the nondiverse parties is appropriate under Fed. R. Civ. P. 20(a), the only

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<sup>1</sup> 36 U.S.C. § 2 provides, in relevant part:

[The American National Red Cross] shall have . . . the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States. . . .

remaining basis for federal jurisdiction—diversity of citizenship—will be destroyed, requiring remand to the state court.

### I.

In April 1984, S.G., a resident of Concord, New Hampshire, entered Concord Hospital to undergo a hysterectomy. During the course of the surgery, a blood transfusion was administered. The plaintiffs, S.G. and her husband, allege that a combination of the negligence of the surgeon, the late Dr. Kenneth L. McKinney, in performing the surgery and the malfunction of a surgical stapler manufactured by Auto Suture Company necessitated the blood transfusion. S.G. was transfused with blood supplied by the American Red Cross Blood Services, Vermont-New Hampshire Region, a division of the American National Red Cross. The blood was allegedly contaminated with human immunodeficiency virus (HIV), and S.G. subsequently contracted AIDS.

In April 1988, the plaintiffs filed suit in the Superior Court of Merrimack County against the estate of Dr. McKinney. In August 1988, they filed suit in the same court against Auto Suture Company. Almost two years later, in March 1990, they filed the instant action in the same court against the Red Cross, simultaneously moving to consolidate this action with the other related actions pending in state court. Before the state court ruled on the motion to consolidate, the Red Cross removed the suit to the United States District Court for the District of New Hampshire pursuant to 28 U.S.C. § 1441, alleging original jurisdiction under 36 U.S.C. § 2 (the Red Cross charter), as well as diversity jurisdiction under 28 U.S.C. § 1332.

The plaintiffs subsequently filed a "Motion to Join Parties, Remand and for Other Relief," requesting that the district court remand the case to state court or, alternatively, order that the state court defendants be joined in the action in federal court. The district court denied the plaintiffs' motion to remand, finding that the suit against the Red Cross fell within the exclusive jurisdiction of the federal court. However, pursuant to the plaintiffs' petition for leave to appeal, the district court modified its order so as to certify the matter for appeal pursuant to 28 U.S.C. § 1292(b). This court accepted certification of the interlocutory appeal on September 13, 1990.

## II.

Assuming that the proper joinder of all other defendants in the federal court would destroy complete diversity, the jurisdiction of the federal district court would depend upon whether that court has *original* subject matter jurisdiction over cases involving the Red Cross.<sup>2</sup> That issue depends in turn upon whether a grant of original jurisdiction can be inferred from the language of the amended federal charter of the Red Cross. See 36 U.S.C. § 2.

A number of federal district courts have decided the jurisdictional question presented here. About half of these courts have held that the existing "sue and be sued" language in the Red Cross charter con-

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<sup>2</sup> In their brief on appeal, the appellants argue that, even if 36 U.S.C. § 2 confers original federal jurisdiction, the case should be remanded to state court either because the basis for jurisdiction does not appear on the face of a well-pleaded complaint or because principles of abstention require remand. Because we hold that the Red Cross charter did not confer original federal jurisdiction, we need not address these arguments.

fers original federal subject matter jurisdiction, while the remainder have held not.<sup>3</sup> Because a district court's decision to remand a case is not appealable, review by the court of appeals is available only through petition pursuant to 28 U.S.C. § 1292(b). Consequently, only one circuit court has addressed the issue presented here. In *Kaiser v. Memorial Blood Center*, No. 89-5533 (8th Cir. April 10, 1991), the Eighth Circuit held that the "sue and be sued" language in the charter conferred original federal jurisdiction over the Red Cross. For the reasons set forth below, we reach a different conclusion.

A. *Case Law and the Interpretation of "sue and be sued" Clauses*

Courts that have held that original jurisdiction exists, including the Eighth Circuit, have relied primarily on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, the Supreme Court sustained the authority of an Ohio federal circuit court to entertain a suit brought by the Second Bank of the United States to enjoin the collection of a state tax levied against the bank. Chief Justice Marshall, writing for the Court, located the specific conferral of original federal jurisdiction over the bank's suit in the language of the bank's charter which empowered it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent

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<sup>3</sup> Compare *Rivera Gonzalez v. Commonwealth of Puerto Rico*, 726 F. Supp. 10 (D.P.R. 1989); *Anonymous Blood Recipient v. Sinai Hospital*, 692 F. Supp. 730 (E.D. Mich. 1988) with *Collins v. American Red Cross*, 724 F. Supp. 353 (E.D. Pa. 1989); *Roche v. American Red Cross*, 680 F. Supp. 449 (D. Mass. 1988).

jurisdiction, and in any circuit court of the United States.” Because this language—unlike the “sue and be sued” language in the charter of the First Bank of the United States—expressly referred to the federal courts, the Court concluded that the charter provision conferred jurisdiction upon the circuit court. *Osborn*, 22 U.S. at 817. Having determined that the charter conferred jurisdiction, the Court went on to conclude that any case involving the congressionally-chartered Bank was, necessarily, a federal question case and therefore within the Article III “arising under” jurisdiction. In other words, *Osborn* held not only that the charter conferred jurisdiction but that, under the Constitution, Congress had the power to confer such jurisdiction over cases involving the bank.

Marshall’s rationale for concluding that suits involving the bank “arise under” federal law—that the bank’s power to “sue and be sued” was created by federal law—led to a great expansion of cases in the federal courts following the enactment of the Judiciary Act of 1875, which established general federal question jurisdiction. See *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885); Mishkin, “The Federal ‘Question’ in the District Courts,” 53 *Colum. L. Rev.* 157, 160 n.24 (1953). To shield federal courts from the burden of federal incorporation cases that were of no substantive federal consequence, Congress, in 1925, enacted the predecessor of what is now 28 U.S.C. § 1349: “The district court shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.” Thus, to the extent *Osborn* suggested



that all suits involving a federally-chartered corporation presented a federal question, 28 U.S.C. § 1349 overruled that aspect of *Osborn*.

The significance of *Osborn*, then, to the Red Cross charter cases, is limited to its focus upon the “sue and be sued” language of the particular charter. In holding that the language of the charter conferred original federal jurisdiction, the *Osborn* Court distinguished *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch.) 61 (1809). In *Deveaux*, the Court interpreted the national bank’s previous charter, which empowered the bank to “sue and be sued . . . in courts of record, or any other place whatsoever,” as having established only the bank’s capacity to litigate. *Osborn*, 22 U.S. at 817. Marshall explained that the *Deveaux* decision “amount[ed] only to a declaration that a general capacity in the bank to sue, without mentioning the courts of this Union, may not give a right to sue in those courts.” *Osborn*, 22 U.S. at 818. This raises the question whether the grant of power to “sue and be sued” expressly in a federal court, as well as in a state court, leads by itself to any different result. We think not. We do not believe that *Osborn*’s holding that the second charter created jurisdiction should be read to confer talismanic significance on a simple reference to federal courts in a congressional charter. On the contrary, *Osborn* must be read in light of subsequent case law and legislation that has both expanded and limited federal jurisdiction in the 166 years since the case was decided.

The Supreme Court revisited the issue of “sue and be sued” clauses in *Banker’s Trust Co. v. Texas and Pacific Railway Co.*, 241 U.S. 295 (1916). In *Bank-*



*er's Trust*, the Court was faced, as we are here, with a "sue and be sued" clause, the specificity of which fell somewhere between *Osborn* and *Deveaux*. Texas & Pacific Railway's charter enabled it to "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all courts of law and equity within the United States." 241 U.S. at 301. The charter made explicit reference to all courts within the United States but, unlike *Osborn*, did not mention a particular federal court (i.e., the circuit court). In *Banker's Trust*, the Supreme Court held that this charter did not expand the jurisdiction of federal courts, explaining that "[h]ad there been a purpose to take suits by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy and the venue, it seems reasonable to believe that Congress would have expressed that purpose in altogether different words." 241 U.S. at 303.

The Supreme Court's requirement, in *Banker's Trust*, of clearer language regarding the conferral of federal jurisdiction rested, at least in part, on the 1915 amendment to the Judiciary Act which provided that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress." Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803. The Court's interpretation of the railroad's charter in light of this amendment is significant to our reading of the Red Cross charter since, as noted, Congress enacted a similar amendment in 1925, 18 U.S.C. § 1349, which applied to *all* federally-chartered corporations. While § 1349 does not preclude an express grant of federal jurisdiction over such a corporation,

*Banker's Trust* strongly suggests that a congressional grant of such jurisdiction should not be implied from ambiguous language. See 241 U.S. at 303.

The "sue and be sued" clause of the Red Cross Charter differs, moreover, in significant ways from the "sue and be sued" clause found to confer federal jurisdiction in *Osborn*. The charter in *Osborn* gave the bank the power to "sue and be sued . . . in all state courts *having competent jurisdiction*, and in any circuit court in the United States" 22 U.S. at 817 (emphasis supplied). Thus, the language of the bank charter in *Osborn* expressly indicated the Congress was concerned with the jurisdiction of the courts in which the bank could "sue and be sued." Certain state courts would have jurisdiction over the bank, and, in those courts, Congress conferred on the bank the power to "sue and be sued." As to federal courts, Congress excluded the jurisdictional caveat, simultaneously conferring the power to sue and expanding federal jurisdiction to include such suits. Such a conferral was important because, at the time the bank was chartered, the district and circuit courts were not vested with any general federal question jurisdiction. Absent some statutory provision linking federal jurisdiction to a particular litigant or set of issues, federal questions usually did not get into the federal courts except on writs of error to the Supreme Court from the highest courts of the states, *see, e.g., McCulloch v. Maryland*, 4 Wheat. 316 (1819), or in the context of a suit between citizens of different states. Thus, at that time, a conferral of the power to sue in a federal court, without some corresponding grant of original federal jurisdiction, would have had relatively narrow application.

The Red Cross charter, like the charters at issue in *Deveaux* and *Banker's Trust*,<sup>4</sup> makes no reference to the jurisdiction of specific courts, either state or federal. Rather, it confers on the Red Cross the power "to sue or be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." This language cannot be deemed to have expanded the jurisdiction of *state* courts over the Red Cross—the Red Cross has no power to "sue or be sued" in a state court, absent some independent basis for the court's jurisdiction. And, unlike the *Osborn* charter, § 2 treats state and federal courts in a parallel fashion. No clear basis exists for interpreting § 2 as having expanded the jurisdiction of federal courts over the Red Cross while merely having conferred on the organization the power to sue in state courts, assuming that some independent jurisdictional ground exists in state court. This is particularly true given the availability of general federal question jurisdiction, an independent basis for original federal jurisdiction which did not exist at the time of *Osborn*.

The Red Cross argues that the more recent case of *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942), stands for the proposition that a charter empowering a corporation to "sue and be sued in state or federal court" establishes original federal jurisdiction over cases involving the corporation. However, in *D'Oench* the Supreme Court did not interpret the meaning of the "sue and be

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<sup>4</sup> The bank's charter in *Deveaux* empowered the bank "to sue and be sued . . . in courts of record, or any other place whatsoever." In *Banker's Trust*, the railroad could "sue and be sued in all courts of law and equity within the United States."

sued" clause. Rather, the Court addressed the question of whether, in a nondiversity case, a federal court should apply state law or federal common law in the absence of a governing federal statute, noting only incidentally that jurisdiction was premised on the "sue and be sued" clause. 315 U.S. at 455. Neither the parties nor the Court directly raised the validity of subject matter jurisdiction under the F.D.I.C. charter. Even more to the point, the F.D.I.C. charter in *D'Oench*—unlike the Red Cross charter—expressly provides that "all suits of a civil nature at common law or equity to which the Corporation shall be a party *shall be deemed to arise under the law of the United States.*"<sup>5</sup> 12 U.S.C. § 264(j) (emphasis supplied).

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<sup>5</sup> The language and legislative history of the F.D.I.C. charter actually support the narrower, nonjurisdictional reading of the Red Cross charter. The original F.D.I.C. enabling legislation of June 16, 1933 provided, in language virtually identical to the Red Cross charter, that the F.D.I.C. would have the power "to sue and be sued, complain and defend, in any court of law or equity, State or Federal." Banking Act of 1933, ch. 89, § 8, 48 Stat. 168 (June 16, 1933). On August 23, 1935, the provision was amended to include the language "shall be deemed to arise under the laws of the United States." Banking Act of 1935, ch. 614, § 101, 49 Stat. 684. The Report of the Senate Committee on Banking and Currency makes clear that the purpose of this amendment was to confer original federal jurisdiction in F.D.I.C. cases. See S. Rep. No. 1007, 74th Cong., 1st Sess. 5. No comparable language can be found in the Red Cross charter.

It is also interesting to note that *D'Oench* is the only case in the 166 years since *Osborn* that the Supreme Court has even arguably held that a "sue and be sued" clause creates federal jurisdiction.

## B. *Legislative History of the Amendment*

Our reading of the "sue and be sued" clause in the Red Cross charter as conferring only the power to sue is supported by the structure of the charter itself and the legislative history of the amendment. Sections one through thirteen of title 36 concern the creation and operating procedures of the Red Cross. Within the framework of the statute, section 2, entitled "Name of corporation; powers," denominates standard corporate powers. For example, the section names the Red Cross and provides for perpetual succession; it confers the right to use a seal and emblem, the power to establish bylaws, and the right to own property. The interpretation of the "sue and be sued" clause as limited to the power of the Red Cross to litigate is consistent with the apparent purpose and context of the clause.

The legislative history of the amendment is relatively sparse and evinces no clear intent on the part of Congress to confer original jurisdiction. When Congress amended the Red Cross charter in 1947, it adopted many of the recommendations of the recently formed Red Cross Advisory Committee. The committee, known as the Harriman Committee, was formed to recommend changes in the Red Cross charter to make the governing board more representative and to ensure the most effective handling of its programs. *The American National Red Cross Report of The Advisory Committee on Organization*, at 3, 15 (June 11, 1946) (hereinafter *Report*). In the last section of its report, entitled "Miscellaneous Recommendations," the committee recommended that the charter clarify the status of the Red Cross as a litigant in federal court:



*Recommendation No. 22. The Charter should make it clear that the Red Cross can sue and be sued in the Federal Courts.* The present Charter gives the Red Cross the power to "sue and be sued in courts of law and equity within the jurisdiction of the United States." The Red Cross has in several instances sued in the Federal Courts, and its powers in this respect have not been questioned. However, in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the Charter.

*Report at 35-36.*

This recommendation led Congress to amend the charter by inserting the phrase "State or Federal" following the existing language "sue and be sued in the courts of law and equity" in the Red Cross charter. Even assuming that Congress acted in direct response to the committee's recommendation, the insertion of this language is insufficient to support the expansive view of federal jurisdiction urged by the Red Cross in this case. The Harriman Committee report itself does not clearly indicate that the proposed amendment was aimed at conferring federal subject matter jurisdiction as opposed to clarifying capacity to litigate in the federal courts when jurisdiction otherwise existed. Explaining the recommendation, the report initially refers simply to the Red Cross's *power* to sue in federal court. Although the report subsequently refers to the jurisdiction of federal courts and the "right" of the Red Cross in this regard, the language of the recommendation itself makes no such reference to jurisdiction. The goal of the recommendation seems to have been to confirm the Red Cross's capacity to litigate in federal court; indeed, the report expressly



noted that the organization had done so in the past based on ordinary jurisdictional grounds. *Id.*; see, e.g., *Lovskog v. American National Red Cross*, 111 F.2d 88 (9th Cir. 1940); *American Red Cross v. Raven Honey Dew Mills*, 74 F.2d 160 (8th Cir. 1934). As the Committee recommended, the revised charter does make clear that the Red Cross “can sue and be sued in federal court.” However, the language of the amendment does not purport to expand the jurisdiction of federal courts to include all cases involving the Red Cross. Moreover, the Senate Report makes no mention of the jurisdictional point whatsoever. S. Rep. No. 38, 80th Cong., 1st Sess., reprinted in 1947 *U.S. Code Cong. Serv.* 1028.

Had Congress intended to expand jurisdiction, it could easily have adopted the clear and specific language used to create federal jurisdiction common in other charters amended at approximately the same time. For example, eleven weeks after amending the Red Cross charter, the same Congress passed legislation amending the charter of the Federal Crop Insurance Corporation. The F.C.I.C.’s amended charter provided that it “may sue and be sued in its corporate name in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is hereby conferred upon such district court to determine controversies without regard to the amount in controversy.” Act of August 1, 1947, ch. 440, § 7, 61 Stat. 719 (current version at 7 U.S.C. § 1506) (emphasis supplied). Congress so amended the F.C.I.C. charter despite the presence of the language “sue and be sued in any court, state or federal” in the corporation’s original charter.

Similarly, in creating the Commodity Credit Corporation in 1948, Congress provided that “the district

courts of the United States . . . shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation." Act of June 29, 1948, ch. 704, § 4, 62 Stat. 1070; *see also* note 4, *supra*, (noting the inclusion of "deemed to arise under" language in the F.D.I.C. charter amended in 1935.) Thus, at the very time it amended the Red Cross charter, Congress could be quite specific in expressing grants of federal jurisdiction. In such circumstances, we are unable to interpret the 1947 amendment confirming the Red Cross's capacity to litigate as intended simultaneously to expand the subject matter jurisdiction of federal courts to encompass all suits by and against that organization.

Finally, we note that *Patterson v. American National Red Cross*, 101 F. Supp. 655 (M.D. Fla. 1951), a case decided just four years after the charter amendment, suggests that even the Red Cross itself did not view the 1947 amendment as having created a new basis for federal jurisdiction. In that case, the Red Cross opposed the plaintiff's motion to remand a case that the Red Cross had removed to federal court based on diversity jurisdiction. The *Patterson* court cited the 1947 amendment merely as proof that Congress envisioned the prospect of federal litigation in which the Red Cross was a party. The Red Cross did not even suggest that the amendment conferred federal jurisdiction but viewed it, as did the court, merely as confirming the right of the organization to invoke diversity jurisdiction.

This is not to say that the question whether Congress intended to convert all Red Cross cases into federal question cases when it amended the Red Cross charter is easily decided. As a matter of practical

sense, it is easy to imagine that Congress would have conferred federal subject matter jurisdiction in cases by and against the Red Cross had the issue been presented. The division among the district courts and our sister circuit's conclusion differing from the one we reach today tempt us to reach out for a reading of the statute which, while unsupported in the text and legislative history, may seem more in tune with the times.<sup>6</sup> But we are not legislators. Our responsibility as a court is to interpret the law as written. If the statute was ineptly drafted—as may have been the case—or if modern demands now require conferring federal jurisdiction over Red Cross cases, the Congress has plenary power to act. We hold simply that neither the express language nor the history of the 1947 amendment of § 2 establishes that Congress intended to grant the Red Cross access to federal courts for the disposition of cases governed by state law absent some independent basis for federal jurisdiction.

*Reversed and remanded. Costs to appellant.*

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<sup>6</sup> We note, however, that a grant of original federal jurisdiction over cases involving the Red Cross would not lead to increased uniformity in the determination of that organization's liability in the HIV cases. The tort law of the forum state would provide the rule of decision for the case, whether it is brought in state or federal court. See 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."); see also, Friendly, "In Praise of Erie—And of the New Federal Common Law," 39 N.Y.U.L. Rev. 383, 421-22 (1964) (noting that "Erie applies, whatever the basis of jurisdiction, to any issue in the case which is governed by state law operating of its own force").

APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 90-1873

S.G. and A.E.,  
PLAINTIFFS, APPELLANTS,

v.

AMERICAN NATIONAL RED CROSS,  
DEFENDANT, APPELLEE.

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JUDGMENT: Entered: July 24, 1991

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The order of the district court is reversed and the cause is remanded to the district court in accordance with the opinion issued this date.  
Costs to appellants.

By the Court:

FRANCIS P. SCIGLIANO  
Clerk

[cc: Messrs. Upton and Wolf]

APPENDIX C

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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Civil No. 90-145-D

SUSAN GLADSTONE; ARTHUR ELLISON

v.

AMERICAN NATIONAL RED CROSS (sued herein under  
the name "AMERICAN RED CROSS BLOOD SERVICES,  
VERMONT-NEW HAMPSHIRE REGION, a Division  
of American Red Cross)

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ORDER

This Order addresses the issues raised by plaintiffs' motion seeking joinder of parties and remand (document no. 5). Defendant objects to such motion (document no. 8).<sup>1</sup>

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<sup>1</sup> On May 22, 1990, while the Court was engaged in completion of its Order, plaintiff filed a motion to permit the filing of a supplemental memorandum of law. The thrust of this motion was that defendant had failed to advise the Court that, as indicated in this Order, there was a division of judicial opinion with respect to the issue of federal jurisdiction concerning legal actions to which the American National Red Cross ("Red Cross") was a party. As the Court was already aware of and had reviewed such decisions, it finds the supplemental memorandum will not be helpful to it, and therefore denies the motion for filing of such memorandum.



### 1. *Background*

In April 1984, plaintiff Susan Gladstone, a resident of Concord, New Hampshire, underwent surgery at Concord Hospital. The surgeon was the late Kenneth L. McKinney, Jr., M.D.

In the course of the surgery, a blood transfusion was ordered and administered. Allegedly, the transfusion involved blood contaminated with the virus believed to be causal of AIDS, and plaintiff contends that she contracted such disease as a result of this transfusion.

In April 1988, plaintiffs<sup>2</sup> brought suit in the Superior Court of Merrimack County against the Estate of Dr. McKinney.<sup>3</sup> In August 1988, plaintiffs brought suit in the same court against Auto Suture Company.<sup>4</sup> The instant action was commenced in the same court in March 1990, naming Red Cross<sup>5</sup> as a defendant. Plaintiffs simultaneously moved to consolidate the instant action with the prior pending actions in the state court. Red Cross timely filed its notice of re-

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<sup>2</sup> Plaintiff Arthur Ellison is the spouse of plaintiff Susan Gladstone.

<sup>3</sup> The gist of the action against the Estate of Dr. McKinney is that he negligently performed surgery in such fashion that a transfusion was required.

<sup>4</sup> The gist of the action against Auto Suture Company is that it manufactured the surgical stapler used by Dr. McKinney in the course of the operation and that such stapler was defective and, in turn, causative of the need for the transfusion.

<sup>5</sup> The actual named defendant is American Red Cross Blood Services, Vermont-New Hampshire Region, a Division of American Red Cross. For ease of reference, the term "Red Cross" will be applied with respect to the defendant.



removal of the instant action to this court. The instant motion invokes the provisions of Rule 20(a), Fed. R. Civ. P.,<sup>6</sup> and 28 United States Code 1441<sup>7</sup> and 1447(e).<sup>8</sup>

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<sup>6</sup> Rule 20(a), Fed. R. Civ. P., provides in relevant part:

All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

<sup>7</sup> 28 U.S.C. § 1441(b) provides:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

<sup>8</sup> 28 U.S.C. § 1447(e) provides:

If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

This section of the statute was added as of November 19, 1988, as part of the Judicial Improvements and Access to Justice Act, P.L. 100-702 ("the Act"). Designed, at least in part, to reduce the volume of diversity cases in federal courts, *Greer v. Skilcraft*, 704 F. Supp. 1570, 1575 (W.D. Ala. 1989), this section of the Act, codified at 28 U.S.C. § 1447(e) is to be more liberally construed than is the case where joinder is sought pursuant to the provisions of Rule 19, Fed. R. Civ. P. *Id.*, 704 F. Supp. at 1577; *Righetti v. Shell Oil Co.*, 711 F. Supp. 531, 533-35 (N.D. Cal. 1989); *Heininger v. Welcare Distributors, Inc.*, 706 F. Supp. 860, 861-62 (S.D. Fla. 1989).

The response of Red Cross is twofold: (1) the instant action has been properly removed to this court; and (2) in any event, actions against Red Cross must be lodged in a federal court.

## 2. Discussion

### a. *The Allowance of Joinder*

Unless the only motive for seeking joinder is the destruction of diversity jurisdiction, the majority view is that joinder is addressed to the discretion of the court. *Walker v. Union Carbide Corp.*, 630 F. Supp. 275, 277 (D. Me. 1986) (and cases therein cited); *Adorno Enterprises v. Federated Department Stores*, 629 F. Supp. 1565, 1572-73 (D.R.I. 1986); *Shaw v. Munford*, 526 F. Supp. 1209, 1214 (S.D.N.Y. 1981).

Red Cross argues that it would be fundamentally unfair to permit joinder and remand at this stage of the proceedings. It says that much discovery has been had in its absence, with resultant prejudice to its defenses, and it points out perceived evidentiary problems were the cases to be tried in one forum.

It is well established that the addition of a non-diverse defendant<sup>9</sup> destroys diversity jurisdiction in a federal court. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Accordingly, a district court, in balancing the defendant's interests in maintaining a federal forum against the competing interests of abrogation of parallel lawsuits, must consider a number of factors. *Hensgens v. Deere &*

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<sup>9</sup> The Estate of Dr. McKinney is resident in New Hampshire, and thus no diversity exists between it and the plaintiffs.

*Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987), *cert. denied*, 110 S. Ct. 150 (1989). These include the extent to which the purpose of the proposed joinder is to defeat federal jurisdiction, whether plaintiffs have been dilatory in asking for joinder, whether plaintiffs will be significantly injured if joinder is not allowed, and any other factors bearing on the equities. *Id.* The closeness of the relationship between the new and old parties to the litigation, the effect of joinder on the court's jurisdiction, and the liberality with which Rule 20(a), Fed. R. Civ. P., is to be construed, are additional factors to weigh in such balance. *Desert Empire Bank v. Insurance Co. of North America*, 623 F.2d 1371, 1375-76 (9th Cir. 1980).

Thus considered, the call here is a close one. Plaintiffs have been dilatory in seeking to press claims against Red Cross, and the discovery which took place in the interim will make it more difficult for Red Cross to mount its defenses. On the other hand, the avoidance of waste of scant judicial resources involved in parallel proceedings militates against the maintenance of separate trials in state and federal courts, and, although difficult, the completion of discovery is not here impossible.<sup>10</sup> Moreover, a competent trial judge should have no unusual difficulty in resolving the perceived evidentiary problems raised by Red Cross.

On balance, therefore, absent jurisdictional matters hereinafter discussed, the Court would be inclined to

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<sup>10</sup> The Court notes that the motion for consolidation filed in state court concedes the plaintiffs' willingness to allow Red Cross to complete such discovery as is necessary to properly prepare its defenses.

permit joinder and order a remand of this action to the state court.

*b. The Jurisdictional Problem*

In pertinent part, 36 U.S.C. § 2 provides:

The name of this corporation shall be "The American National Red Cross", and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States. . . .

(Emphasis added.)

Red Cross argues that the "sue-and-be-sued" clause above emphasized operates to create exclusive federal jurisdiction over legal actions to which Red Cross is a party.

As with the issue previously discussed concerning joinder, the courts are divided on this argument. Illustrative (although not all inclusive) in supporting the position of Red Cross are the decisions in *Rivera Gonzalez v. Commonwealth of Puerto Rico*, 726 F. Supp. 10 (D.P.R. 1989); *Kaiser v. Memorial Blood Center of Minneapolis, Inc.*, 724 F. Supp. 1255 (D. Minn. 1989); *Anonymous Blood Recipient v. Sinai Hosp.*, 692 F. Supp. 730 (E.D. Mich. 1988); *C.H. v. American Red Cross*, 684 F. Supp. 1018 (M.D. Mo. 1987). Contrary decisions are to be found in *Collins v. American Red Cross*, 724 F. Supp. 353 (E.D. Pa. 1989); *Anonymous Blood Recipient v. William Beaumont Hosp.*, 721 F. Supp. 139 (E.D. Mich. 1989); *Walton v. Howard Univ.*, 683 F. Supp. 826 (D.D.C. 1987); *Roche v. American Red Cross*, 680 F. Supp. 449 (D. Mass. 1988); *Griffith v. American Red Cross*, 678 F. Supp. 182 (S.D. Ohio 1984).

The foundation of this judicial division appears to be the ruling of the Supreme Court in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). In the *Osborn* case, the State of Ohio, seeking to enforce a statute imposing a tax on the Bank of the United States, seized funds of the bank. The bank obtained an injunction in federal court prohibiting the state from enforcing the tax and requiring return of the seized funds. In upholding the injunction, the Supreme Court looked to a clause in the bank's charter allowing it to "sue and be sued . . . in all State Courts having competent jurisdiction, and in any Circuit Court of the United States," holding that such clause was a comprehensive grant of federal jurisdiction in all cases to which the bank was a party.

The *Osborn* decision has been the subject of criticism and questioning, see, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983); *Anonymous Blood Recipient v. William Beaumont Hosp.*, *supra*, 721 F. Supp. at 142-44, but it has never been overruled. Accordingly, with due respect for the scholarly approach of the distinguished jurists who have sought to distinguish it in the context of jurisdiction pursuant to 36 U.S.C. § 2, this Court finds the better-reasoned rule to be that requiring a finding, here made, that legal actions to which the Red Cross is a party fall within the exclusive jurisdiction of federal courts. It follows that joinder or remand of the instant action to a state court is not permitted.<sup>11</sup>

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<sup>11</sup> Nor is this case one in which the expansion of removal jurisdiction (discussed in *Charles D. Bonanno Linen Service, Inc. v. McCarthy*, 708 F.2d 1, 10 (1st Cir.), *cert. denied*, 464



### 3. Conclusion

Although federal courts regularly decide questions of state law pursuant to diversity jurisdiction, it has to be borne in mind that, in fact, unlike their state counterparts, federal courts are possessed of limited, rather than general, jurisdiction. For the reasons hereinabove detailed, the Court, albeit reluctantly, finds and rules that it must and according herewith does deny plaintiffs' motion seeking joinder and remand of the instant action to the state court.

SO ORDERED.

/s/ Shane Devine  
Chief Judge  
United States District Court /

May 24, 1990

cc: Gary B. Richardson, Esq.  
Irvin D. Gordon, Esq.  
Bruce M. Chadwick, Esq.

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U.S. 936 (1983), and *Thomas v. Shelton*, 740 F.2d 478, 482-83 (7th Cir. 1984)), with its attendant constitutional questions comes into play.



## APPENDIX D

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

---

Civil No. 89-145-D

SUSAN GLADSTONE; ARTHUR ELLISON

v.

AMERICAN NATIONAL RED CROSS (sued herein under the name "AMERICAN RED CROSS BLOOD SERVICES, VERMONT-NEW HAMPSHIRE REGION, a Division of American Red Cross)

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ORDER

Plaintiffs have moved (document no. 11) the Court to modify its Order of May 24, 1990 (document no. 10) in such fashion as to permit certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). The defendant Red Cross objects (document no. 12).

*1. Background*

The Court's Order considered plaintiff's motion to join additional parties defendant and to remand the joined action to state court.<sup>1</sup> Upon analysis of the factors required in consideration of 28 U.S.C. § 1447

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<sup>1</sup> As the parties sought to be joined were New Hampshire residents, as are plaintiffs, their joinder would destroy diversity and require remand. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).

(e) and Rule 20, Fed. R. Civ. P., the Court ruled that "absent jurisdictional matters hereinafter discussed [it] would be inclined to permit joinder and order a remand of this action to the state court." Document no. 10, at 6.

The jurisdictional matters referred to concerned the issue as to whether 36 U.S.C. § 2 vested original jurisdiction over Red Cross in federal courts. On review of the conflicting authorities interpreting that statute, the Court ruled that such jurisdiction was vested in the federal court, and therefore plaintiff's motion must be denied.

## 2. Discussion

In pertinent part, 28 U.S.C. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The court of appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken in such order, if application is made to it within ten days after the entry of the order.

In the First Circuit, it is clearly established that only rare cases will qualify for the relief of certification afforded by 28 U.S.C. § 1292(b). *Lane v. First Nat'l Bank of Boston*, 871 F.2d 166, 167 n.2 (1st Cir. 1989); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988);

*Palandjian v. Pahlavi*, 782 F.2d 313, 314 (1st Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987); *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984).

Plaintiffs point to the conflicting decisions on the issue of jurisdiction over Red Cross. Such decisions exist in the First Circuit, *compare Rivera Gonzalez v. Commonwealth of Puerto Rico*, 726 F. Supp. 10 (D. P.R. 1989), *with Roche v. American Red Cross*, 680 F. Supp. 449 (D. Mass. 1988), and elsewhere, *see* Document 10, at 7. Such conflict, the Court concludes, qualifies the issue for certification under the First Circuit requirements.

Defendant argues, however, that as diversity jurisdiction continues to exist, resolution of the issue of jurisdiction over Red Cross pursuant to 36 U.S.C. § 2 would not materially advance the ultimate determination of the litigation. Because the Court did not wisely choose the language in its prior Order, this argument, as the Order now stands, has some merit.

Accordingly, the Court herewith modifies its Order of May 24, 1990, by striking therefrom the last paragraph before the heading "b. The Jurisdictional Problem" on page 6, and inserting in its place and stead the following paragraph.

On balance, therefore, although there is diversity jurisdiction as between plaintiffs and Red Cross, proper consideration of the factors required in application of 28 U.S.C. § 1447(e) and Rule 20, Fed. R. Civ. P., require that plaintiff's motion for joinder and remand be granted. Unfortunately, however, an order to this effect may not now be entered because of additional jurisdictional matters which are hereinafter discussed.

The Court further modifies its Order of May 24, 1990, by adding (under the heading "Conclusion") on page 9 the following paragraph.

The conflicting decisions of the districts both within and without the First Circuit make the instant case one of those "rare cases" which cry out for certification to the Court of Appeals of the First Circuit pursuant to the provisions of 28 U.S.C. § 1292(b). Specifically, the issue of jurisdiction over Red Cross pursuant to 36 U.S.C. § 2 presents a "controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from [this court's] order may materially advance the ultimate termination of the litigation."<sup>2</sup> The Court therefore respectfully requests the Court of Appeals to accept certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292 (b).

In all other respects, the Order of May 24, 1990, is herewith affirmed. Pending resolution of whether the Court of Appeals will accept certification of the interlocutory appeal, further proceedings in the instant litigation are stayed. If certification is accepted, this stay is to be continued until final resolution of the interlocutory appeal. Counsel for plaintiffs is directed to advise the Court in writing at intervals of ninety (90) days as to the status of this litigation.

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<sup>2</sup> With respect to the issues of joinder and remand, this case is similar on its facts to those before the Court in *Wilson v. Famatex GmbH*, 726 F. Supp. 950 (S.D.N.Y. 1989).

SO ORDERED.

/s/ Shane Devine  
Chief Judge  
United States District Court

June 19, 1990

cc: Gary B. Richardson, Esq.  
Irvin D. Gordon, Esq.  
Bruce M. Chadwick, Esq.





(2)  
No. 91-594

Supreme Court, U.S.

FILED

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In The

# Supreme Court of the United States

October Term, 1991

AMERICAN NATIONAL RED CROSS,

*Petitioner,*

vs.

S.G. and A.E.,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the First Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## **QUESTIONS PRESENTED**

1. Whether 28 U.S.C. § 1447 (d) (which makes unreviewable District Court orders remanding actions to the state court from which they were removed) precludes review of this action which has been remanded to the state court.

2. Whether the American National Red Cross' petition for certiorari should be denied because:

(a) The substantive issue presented is not ripe for review;

(b) The judgment of the Court of Appeals was issued on interlocutory review;

(c) The basis for federal jurisdiction does not appear on the face of the complaint;

(d) The issue appealed is not of sufficient importance to warrant certiorari review; and

(e) The decision of the Court of Appeals is correct.

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No. 91-594

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In The  
**Supreme Court of the United States**

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October Term, 1991

AMERICAN NATIONAL RED CROSS,

*Petitioner,*

vs.

S.G. AND A.E.,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the First Circuit*

---

**RESPONDENTS' BRIEF IN OPPOSITION**

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The respondents, S.G. and A.E., respectfully request that this Court deny the petition for writ of certiorari seeking review of the First Circuit's opinion in this case. That opinion is reported at 938 F.2d 1494 (1st Cir. 1991).

## STATEMENT OF FACTS

The respondent, S.G., in August, 1984 underwent a hysterectomy at Concord Hospital in Concord, New Hampshire. During this operation a blood transfusion was required. This blood was contaminated with human immunodeficiency virus (HIV) and as a result S.G. now suffers from AIDS.

Upon discovering that she had this disease S.G. and her husband, A.E., commenced two actions in Merrimack County Superior Court (state court), one against Kenneth L. McKinney (the physician who performed the operation) and the other against U.S. Surgical Corp. (the company that manufactured and sold the surgical stapler used by Dr. McKinney during the operation). These suits were commenced in April and August of 1988 in the state court and were later joined (Appendix A, 3a, 6a). As discovery progressed, it became evident that a third party, American National Red Cross, was responsible for furnishing the tainted blood. On March 2, 1990, the respondents commenced suit against Red Cross in Merrimack County Superior Court (Appendix A, 1a) and this writ was accompanied by a motion to consolidate the action with the two pending suits against Dr. McKinney and U.S. Surgical Corp.

Before the Superior Court could rule on this motion to consolidate, Red Cross removed the action against it to United States District Court for the District of New Hampshire on two grounds, (a) that the Red Cross Charter, 36 U.S.C. § 2, conferred on federal district courts original jurisdiction over actions involving the Red Cross, and (b) that the parties are citizens of different states and that federal jurisdiction is appropriate under 28 U.S.C. § 1332(a). Respondents filed a motion to join Dr. McKinney and U.S. Surgical Corp. and remand the entire action to Merrimack County Superior Court pursuant to 28 U.S.C. § 1447(e). Relying principally on *Osborn v. Bank of the United States*, 22 U.S. (9

Wheat.) 738 (1824), the District Court ruled that legal actions to which the Red Cross is a party fall within the exclusive (original) jurisdiction of the federal courts. The court also ruled that but for this issue, it would grant plaintiff's motion to join and remand the case to the state court pursuant to Rule 20 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1447(d).

Upon interlocutory review, the First Circuit Court of Appeals reversed, finding that the Red Cross Charter did not confer original federal jurisdiction. *See S.G. and A.E. v. American National Red Cross*, 938 F.2d 1494 (1st Cir. July 24, 1991). On August 13, 1991 the First Circuit denied petitioner's motion for a stay of the mandate, and remanded the action to the District Court. On September 24, 1991, the District Court reaffirmed its prior order joining the two non-diverse defendants (Dr. McKinney and United States Surgical Corporation) and remanded the case to Merrimack County Superior Court (Appendix C, 15a).

Following that remand Red Cross also petitioned this Court for a stay of the mandate of the Court of Appeals which was denied by Justice Souter on September 30, 1991. Presently before this Court is the Red Cross petition for writ of certiorari which seeks another determination of whether 36 U.S.C. § 2 vests federal courts with original jurisdiction over actions involving the Red Cross.

## **REASONS FOR DENYING THE WRIT**

### **I.**

#### **THE DISTRICT COURT'S ORDER REMANDING THIS ACTION TO STATE COURT IS UNREVIEWABLE.**

28 U.S.C. § 1447(d) provides in relevant part that, "An order remanding a case to the State court from which it was removed

is not reviewable on appeal or otherwise. . . .”<sup>1</sup> See *Thermtron Prods. Inc. v. Hermandorfer*, 423 U.S. 336, 343 (1976) (District Court’s decision to remand action that was removed “improvidently and without jurisdiction” is unreviewable); *Seedman v. U.S. Dist. Ct. for Cent. Dist. of California*, 837 F.2d 413 (9th Cir. 1988) (per curiam) (remand order returns case to state courts, and federal court has no power to retrieve it). See generally, 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3740 (2d ed. 1985 and Supp. 1991); 12 J. Moore, H. Bendix & B. Ringle, *Moore’s Federal Practice* ¶ 507.01 (2d ed. 1990). Such orders were made unreviewable primarily because Congress intended to bar prolonged litigation over questions of the District Court’s jurisdiction. *United States v. Rice*, 327 U.S. 742, 751 (1946) (“Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interruption of the litigation of the merits of a removal cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.”). See also, *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563, 568-569 (1941); *In re La Providencia Development Corporation*, 406 F.2d 251 (1st Cir. 1969); *In re Bear River Drainage District*, 267 F.2d 849, 851 (10th Cir. 1959). This concern is reflected in Justice Scalia’s recent observation that “[n]othing is more wasteful than litigation about where to litigate.” *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (dissenting opinion).

---

1. Prior to 1875, a remand order was regarded as a nonfinal order reviewable by mandamus but not by appeal. In 1875, Congress provided for review “by the Supreme Court on writ of error or appeal, as the case may be.” Twelve years later, Congress barred any such review. *Georgia v. Rachel*, 384 U.S. 780, 786 n.6 (1966). Until its amendment in 1964, the statutory bar prohibited review of a remand order “on appeal or otherwise” in cases removed pursuant to any statute. With an exception not pertinent to the instant case, the modern version of the statutory bar, 28 U.S.C. § 1447(d), absolutely prohibits appellate review of remand orders.

Although ignoring the issue in its petition for certiorari, the Red Cross has previously conceded the validity of this argument. In support of its motion in District Court for a stay of proceedings pending appeal, the Red Cross asserted:

Because this Court has previously announced how it would resolve the joinder and diversity issues (Order of June 19, 1990 at 4, modifying Order of May 24, 1991), the Red Cross is concerned that without a stay of proceedings, this Court may immediately resolve the diversity issue and remand the action to state court. *Such a remand to state court would foreclose the Red Cross from appealing the charter issue to the United States Supreme Court, because an order to remand is unappealable under the circumstances of this case. See 28 U.S.C. § 1447(d).*

(Emphasis added) (Appendix B, 9a, 10a). The District Court did resolve the diversity and joinder issues and it thereafter issued an order remanding the case to state court. As the Red Cross recognized, it is now precluded by operation of 28 U.S.C. § 1447(d) from pursuing the instant appeal.

The concerns announced by Congress in enacting § 1447(d) and by Justice Scalia in the *Bowen* case are well illustrated by the Red Cross' evasive maneuvering in the instant action. Almost two years after this action was initiated, the Red Cross continues to avoid trial by repeatedly challenging the state court's ability to adjudicate a matter involving allegations of common law negligence. There is no question that the related actions against Dr. McKinney and United States Surgical will be decided in the Merrimack County Superior Court. There is no reason to believe that the Superior Court would not fairly adjudicate respondents' claims against the Red Cross. There is also no good reason for



the Red Cross to fear state court jurisdiction.

The Red Cross' attempt to obtain review of the District Court's unreviewable order should be summarily rejected.

## II.

### **THE ISSUE OF FEDERAL JURISDICTION IS NOT YET RIPE FOR DECISION BY THIS COURT.**

Rule 10 of the Rules of the Supreme Court states that review on writ of certiorari is available to resolve a conflict between decisions rendered by different courts of appeals. As Rule 10.1 makes clear, however, such review is not a matter of right but of judicial discretion.

Until the last six months, the jurisdictional issue raised by the Red Cross had only been considered by federal district courts. Approximately half of those courts concluded that federal courts have original jurisdiction over actions involving the Red Cross. Only two courts of appeals have as yet addressed the issue.

In *Kaiser v. Memorial Blood Center of Minneapolis*, 938 F.2d 90 (8th Cir. 1991), the Eighth Circuit ruled that the "sue and be sued" clause in the Red Cross charter creates original federal jurisdiction. The *Kaiser* court's discussion of the issue, however, is exceedingly brief. The two paragraphs devoted to this issue contain very little exposition of the reasoning behind its ruling. Two recent federal district courts that have had occasion to address the jurisdictional question presented have expressly found *Kaiser* unpersuasive. See *Walker v. American National Red Cross, et al.*, No. 91-0749, Slip Op. (D.D.C. May 10, 1991) (Revercomb, J.) (holding that the Red Cross' charter does not create original federal jurisdiction: "The opinion of the United States Court of Appeals for the Eighth Circuit, *Kaiser v. Memorial Blood Center*,

*supra*, which does not state the reasons for its conclusions, does not persuade this court otherwise.") (Appendix D, 21a) and *Luckett v. Harris Hospital-Fort Worth*, 764 F. Supp. 436 (N.D. Tex. 1991) (finding *Kaiser* unpersuasive and noting that the *Kaiser* order was primarily concerned with certifying questions to the Minnesota Supreme Court).

In contrast to the *Kaiser* decision, the First Circuit has given the jurisdictional issue presented a searching and painstaking analysis, and has fully set forth the reasons for and the reasoning behind, its conclusions. See *S.G. and A.E.*, 938 F.2d 1494 (1st Cir. 1991). It may well be that the First Circuit decision, once it has had full circulation and analysis will lead to greater uniformity in the decisions which follow so that the present conflict will gradually resolve itself.

Even if the First Circuit decision does not gain wide acceptance, there is another compelling reason why consideration of the issue at this time is premature. This Court has often followed the policy that it will allow the lower courts an opportunity for further study and analysis before offering a resolution to a conflict between Circuits. See *McCray v. New York*, 461 U.S. 961, 963 (1983) and *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall J. dissenting). This approach is particularly appropriate in this case for two reasons. First, only one Circuit Court decision has given this issue searching and definitive analysis. Second, as pointed out by the Red Cross in its petition for certiorari, the Fifth Circuit has recently accepted the issue on interlocutory appeal in *Doe v. Kerwood*, No. 90-9101, Slip Op. (July 19, 1991). The Fifth Circuit decision may indicate a trend toward uniformity on this issue. At the very least, the Fifth Circuit's decision should provide this Court with considerably greater illumination and exposition of the issue than it now has.

## III.

**SINCE THE JUDGMENT IN THE COURT BELOW IS INTERLOCUTORY, THIS COURT SHOULD AWAIT A FINAL DISPOSITION OF THE CASE BEFORE EXERCISING JURISDICTION.**

This Court has long followed a policy of not entertaining petitions for certiorari in interlocutory appeals unless the case presents some extraordinary issue. In *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 184 U.S. 372, 384 (1893), this Court stated that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." In a later case, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), this Court stated that certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . . And except in extraordinary cases, the writ is not issued until final decree." The lack of finality of the judgment below, without more, may furnish sufficient ground for denial of the application. See *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) and *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J. dissenting) (referring to "the Court's normal practice of denying interlocutory review").

Rather than "prevent[ing] extraordinary inconvenience and embarrassment" in the conduct of this case, the granting of this petition will inflict extraordinary harm on the respondents. Respondent S.G. is dying of AIDS. She should not be required to wait indefinitely for a resolution of her suit against the Red Cross. She commenced her suit in April, 1990 and for the last year and a half the parties, at the instance of the Red Cross, have

been litigating about where to litigate, rather than litigating the merits of her case. The granting of this petition will probably delay the resolution of this jurisdictional issue for another year. S.G. deserves a better fate from the legal system than a two-and-a-half year delay of her case, while Red Cross wrangles over the proper forum for her case.

The prejudice to the respondents is not difficult to show. Because of the jurisdictional dispute, discovery is now on hold and the respondents have been unable to obtain the identity of the donor, whether he is still living and whether he would have given blood had the Red Cross followed proper donor screening procedures. Further delay will make it difficult, if not impossible, to get the answers to these and many other vital and pertinent questions.

In addition, it is difficult to understand why Red Cross will experience extraordinary inconvenience or embarrassment if the interlocutory petition is denied. The case will simply proceed to trial in state court along with the other two defendants. State courts have presided over approximately twenty similar cases. *See* Petition for Certiorari, pp. 11-12 (and cases cited therein). There is no claim by the Red Cross that it did not receive fair treatment in those cases. To the contrary, justice may have been better served since all concerned parties were before the same forum at the same time.

Finally, it is entirely possible that if this case proceeds to trial on the merits in state court a result may be produced (such as settlement) which will make it unnecessary for this Court to address the issue.

## IV.

**THIS COURT SHOULD DENY CERTIORARI BECAUSE THE BASIS OF RED CROSS' CLAIM OF FEDERAL JURISDICTION, 36 U.S.C. § 2, DOES NOT APPEAR ON THE FACE OF THE RESPONDENTS' WELL PLEADED COMPLAINT.**

The claim of the respondents against Red Cross arises out of the common law of the State of New Hampshire. Their complaint alleges that the Red Cross negligently failed to properly screen blood donors and as a consequence the respondent, S.G., became infected with the HIV virus, and now suffers from AIDS. There is no mention in the respondents' complaint of the Red Cross Charter or 36 U.S.C. § 2.

Red Cross claims federal jurisdiction under the provision in its charter (36 U.S.C. § 2) that provides that the Red Cross shall have "the power to sue and be sued in courts of law and equity, state or federal, within the jurisdiction of the United States." This is a congressionally enacted statute and Red Cross contends that it falls within the purview of 28 U.S.C. § 1331 which confers on district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

However the presence or absence of federal question jurisdiction is governed by the "well pleaded complaint" rule. Whether a case is one arising under federal law in the sense of the jurisdictional statute must be determined by what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose. *Taylor v. Anderson*, 234 U.S. 74 (1914), *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989). Moreover "to bring a case within the statute, a right or immunity created by



the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat. Bank*, 299 U.S. 109, 112 (1936). The vast majority of cases which fall under federal question jurisdiction are covered by Justice Holmes' statement that a "suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne S. Bowler Co.*, 241 U.S. 257, 260 (1916).

In the suit of S.G. and A.E. against Red Cross, the "sue and be sued clause" in the Red Cross Charter is not an essential element of the respondents' state law claim, and there is no reason or justification for it to appear in their complaint. Therefore this Court should deny federal question jurisdiction on the basis of this very salutary rule.<sup>2</sup> This is a case arising under state law, and it is quite appropriate that a state forum should resolve it. As the court said in *Doe v. American Red Cross*, 727 F. Supp. 186, 192 (E.D. Pa. 1989):

The thrust of Congressional policy since 1925 has been to limit federal-question jurisdiction of cases not involving government instrumentalities to those situations in which the governing law is federal. The policy is a sound one. It respects the balance of authority between state and federal courts which is an essential ingredient of the federal system.

*See also, Luckett v. Harris Hospital-Fort Worth, supra* at 441.

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2. This issue was raised in the lower court but not addressed by its opinion because its ruling on the charter issue disposed of the case. *S.G. v. American National Red Cross, supra* at 1496.



## V.

**THE ISSUE RAISED BY RED CROSS IS NOT OF SUFFICIENT IMPORTANCE TO GRANT CERTIORARI.**

Rule 10.1 of the Supreme Court Rules provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." In *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954) this Court defined in a general way the phrase "special and important".

A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach beyond the academic or the episodic.

No doubt the issue presented by Red Cross has academic appeal as it raises the question of whether a decision rendered by Chief Justice Marshall in 1824 should be used to determine the meaning of a statute enacted in 1947. However this issue is much more important to the Red Cross, and to the parties who have claims against it, than to the general public.

Whether the cases — now totalling about 40 — are tried in federal court or state court, they will eventually proceed to judgment, and presumably justice will be done. Citizens of the State of New Hampshire will sit on this case whether it is tried in federal or state court, and it is difficult to perceive how Red Cross will suffer more bias in state court than federal court. (Compare the prejudice to the plaintiffs of having to try their case twice with the possibility of inconsistent verdicts since all

defendants will not be present in either forum.) Each forum is equally competent to dispose of the issues in this case.

Red Cross suggests that it will promote uniformity to have certain federal questions—such as whether it can be subjected to a jury trial or punitive damages — determined in a federal court. However, this Court has frequently recognized that state courts are quite competent to entertain federal claims and litigation over federal rights. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-478 (1981); *Rose v. Lundy*, 466 U.S. 509, 518 (1982); *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 437 (1982). As for uniformity, if the question is an easy one, it is likely that uniformity will be achieved whether a federal or state forum decides it; if it is a difficult one, as in this case, the courts will disagree, whether the issue is decided exclusively in a federal or state forum, or in both forums.

Red Cross' argument also ignores the fact that these claims arise under state tort law rather than federal law, and uniformity under differing state tort systems may be impossible to achieve. As the First Circuit observed, "We note, however, that a grant of original federal jurisdiction over cases involving the Red Cross would not lead to increased uniformity in the determination of that organization's liability in HIV cases. The tort law of the forum state would provide the rule of decision for the case, whether it is brought in state or federal court." *S.G. v. American Nat. Red Cross*, *supra* at 1501.

Red Cross also suggests that a federal forum is necessary to insulate it from "local or regional needs or prejudices" which may exert undue pressure on it. While it is possible such needs and pressures exist, it is also likely that the motives of Red Cross in seeking a federal forum are more mundane and tactical than the achievement of uniformity and insulation from local prejudice. In almost all of the suits against Red Cross, if not all, there are

multiple defendants. When Red Cross removes a case to federal court, the other defendants are often left behind in state court, thereby forcing the plaintiff to try his case twice in two different forums. This puts the Red Cross in a position to cast blame on the absent defendants when the cases are tried in federal court.

Red Cross has attempted to broaden the issue to include the charters of the Department of Housing and Urban Development (12 U.S.C. § 1702), the Pension Benefit Guarantee Corporation (29 U.S.C. § 1302) and the Federal National Mortgage Association and Government National Mortgage Association (12 U.S.C. § 1723a(a)), each of which has a "sue and be sued" clause similar to, but not the same as the Red Cross. It should be noted that this language in each charter falls within an enumeration of the powers of the corporation; thus it is more likely a grant of capacity to litigate than a grant of jurisdiction. *Cf.* Federal Rules of Civil Procedure 17(b). Also, it is significant that each of these charters relates to a corporation under the control of the United States or an agency of the United States. Under 28 U.S.C. § 1349 the district courts are granted jurisdiction over corporations under the control of the United States, and under 28 U.S.C. § 1345 district courts are granted jurisdiction over agencies of the United States which commence civil actions. The Red Cross, in contrast, is a private charitable corporation which is neither controlled by nor an agency of the United States. *See Walton v. Howard University*, 683 F. Supp 826, 831-2 (D.D.C. 1987). Therefore, Red Cross' reliance on these charters is clearly misplaced. It is unlikely that the decision of the First Circuit in this case had any effect whatever on these substantially distinct charters, as Congress had already granted each corporation a separate basis of jurisdiction under Sections 1345 and 1349. In short, Red Cross' Charter should be analyzed in the light of its own language and legislative history, rather than resorting to charters of federal agencies and instrumentalities quite different in nature and purpose.

Finally the respondents submit that the most appropriate solution to the problem confronting the Red Cross is a legislative one. If Congress intended to confer federal jurisdiction over suits against the Red Cross, then the Charter was ineptly drafted. As the First Circuit observed, "[If] modern demands now require conferring federal jurisdiction over Red Cross cases, the Congress has plenary power to act." Rather than seek a judicial solution to its problem, with all the attendant expenditure of scarce judicial resources, Red Cross should present its problem without further delay to Congress. In the past Congress has often demonstrated its capacity to cut such Gordian Knots.

## VI.

### **THE DECISION OF THE COURT OF APPEALS IS CORRECT.**

Red Cross asserts that its charter (36 U.S.C. § 2) creates original federal jurisdiction which entitles Red Cross to remove to federal court actions to which it is a party. Section 2 in pertinent part reads as follows:

#### 2 Name of Corporation; Powers

The name of the corporation shall be "The American National Red Cross" and by that name it shall have perpetual succession, *with the power to sue and be sued in courts of law and equity, State and Federal within the jurisdiction of the United States.*

(Emphasis added).

As stated above, the district courts have about evenly divided over whether this clause is a special grant of federal jurisdiction,

allowing Red Cross access to federal court in all cases. The reason for this split is obvious; the charter does not clearly and unambiguously grant federal jurisdiction to the Red Cross. Federal jurisdiction can only be found by implication and by looking at other corporate charters. Courts which have ruled against Red Cross have interpreted the "sue and be sued" clause as a grant of capacity to litigate, since it appears in an enumeration of corporate powers. These courts have reasoned that if Congress wishes to directly confer jurisdiction it usually does so expressly in a separate clause.

Red Cross acknowledges the general rule that a sue and be sued clause does not normally confer jurisdiction; however, Red Cross argues that an exception to this rule exists where Congress has specifically referred to capacity to sue and be sued *in the federal courts*.

In particular, Red Cross relies on the case of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) where the Supreme Court ruled that the bank's charter, which allowed it to "sue and be sued . . . in all courts having competent jurisdiction, and in any Circuit Court of the United States" was a congressional grant of federal jurisdiction in all cases to which the Bank was a party. The First Circuit noted in its decision below that the language of the bank's charter was different from that of Red Cross and could legitimately be construed to grant original federal jurisdiction whereas the Red Cross Charter treats state and federal courts in a parallel fashion, and on the basis of its language cannot be deemed to have expanded the jurisdiction of federal courts. *S.G. v. American Nat. Red Cross*, *supra* at 1498.

Attempting to discern congressional intent in 1947 from the language used in a bank charter in 1824 is open to serious question. As one court commented, "[Osborn] interpreted a different federal charter, a charter from a different era, with a different purpose,



set in a different context.” *Anonymous Blood Recipient v. W. Beaumont Hosp.*, 721 F. Supp. 139, 143 (E.D. Mich. 1989).

Since *Osborn* only one case has arisen in which this Court has construed similar language. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942). In that case this Court construed 17 U.S.C. § 264(j) to confer federal jurisdiction over the FDIC. That section authorized the FDIC “to sue or be sued in any court of law or equity; State or Federal,” and further provided that “all suits of a civil nature at common law or equity shall be deemed to arise under the law of the United States.” This latter language clearly distinguishes the FDIC charter from the Red Cross charter. Thus the bank and FDIC charters are clearly distinguishable from the Red Cross charter both as to the language used and the context in which each was adopted.

Red Cross also contends that the legislative history of its charter shows an intent to confer federal jurisdiction on the Red Cross. The charter was amended in 1947 with the addition of the words “State or Federal” so that it reads “with the power to sue and be sued in courts of law and equity, *State or Federal*, within the jurisdiction of the United States.” This change was urged by the Harriman Committee, a Red Cross advisory committee, and was derived in particular from Recommendation 22 of its report, which reads as follows:

*Recommendation No. 22. The Charter should make it clear that the Red Cross can sue and be sued in the Federal Courts.*

The present Charter gives the Red Cross the power ‘to sue and be sued in courts of law and equity within the jurisdiction of the United States.’ The Red Cross has in several instances sued in the federal Courts, and its powers in this respect have



not been questioned. However, in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the Charter.

This language does not automatically confer original jurisdiction on federal courts. Rather it permits the Red Cross to sue and be sued in federal court if there is independent federal question jurisdiction or diversity jurisdiction. It is likely that the intent of the amendment was to make it clear that the Red Cross, a federally created corporation, could sue in diversity in federal court. See *Walton v. Howard University*, 683 F. Supp. 826, 829 (D.D.C. 1987).

Finally, as the First Circuit observed, Congress, prior to and during the time the Red Cross charter was adopted, was using explicit and specific language to confer federal jurisdiction over other federally created corporations. See *Federal Crop Insurance Corporation*, (7 U.S.C. § 1506) ("jurisdiction is hereby conferred upon such district courts to determine controversies"); *The Commodity Credit Corporation*, (15 U.S.C. § 714) ("the district courts of the United States shall have exclusive original jurisdiction . . . of all suits brought by and against the Corporation,") and *Federal Deposit Insurance Corporation*, (12 U.S.C. § 1819(b)(2)) ("all suits . . . to which the corporation is a party shall be deemed to arise under the laws of the United States"). No comparable language appears in the Red Cross charter and the conclusion is inescapable that Congress, by the language used in the Red Cross Charter, did not intend to confer original federal jurisdiction over actions involving the Red Cross.

**CONCLUSION**

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted

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**APPENDIX A — WRITS OF SUMMONS IN THE SUPERIOR  
COURT OF THE STATE OF NEW HAMPSHIRE**

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

**WRIT OF SUMMONS**

Susan Gladstone and Arthur Ellison  
59 Rumford St.  
Concord, NH 03301

v.

American Red Cross Blood Services  
Vermont-New Hampshire Region, a Division of American Red  
Cross, a federally chartered non-profit association having a place  
of business at 425 Reservoir Ave., Manchester, NH 03105

*To the Sheriff of any County or his Deputy*

**WE COMMAND YOU TO SUMMON** the defendant, American  
Red Cross Blood Service Vermont-New Hampshire Region, a  
Division of American Red Cross

if to be found in your precinct, to appear at the **SUPERIOR  
COURT** at Concord in said County of Merrimack, on the first  
Tuesday of April 1990, to answer to Susan Gladstone and Arthur  
Ellison

**IN A PLEA OF THE CASE** for that on or about August  
22, 1984 and prior thereto the defendant, American Red Cross  
Blood Services Vermont-New Hampshire Region, a Division of  
American Red Cross, was engaged in the business of acquiring

*Appendix A*

and selling blood and blood products to health care providers for transfusion to patients; that the defendant had a duty to screen blood donors to prevent persons in certain high risk groups from donating blood which the defendant knew or should have known involved risk of transmission of the H.I.V. virus to persons such as the plaintiff; the defendant was negligent in failing to properly screen blood donors and on or about August 1, 1984 procured blood from a donor who was infected with the H.I.V. virus; the infected blood was supplied to the Concord Hospital in Concord, New Hampshire and on August 22, 1984 transfused to the plaintiff; that as a result, the plaintiff became infected with the H.I.V. virus and currently is suffering from the Acquired Immune Deficiency Syndrome (A.I.D.S.) which has caused her loss of enjoyment of life, loss of probable life expectancy, extreme mental anguish and past, present and future pain and suffering, medical costs, loss of earning capacity and loss of wages, all to her damage, as she says, greatly in excess of the jurisdictional minimum requirements of the Superior Court, together with interest and costs.

*Witness, Richard P. Dunfey, Esquire, the 2nd day of Mar. A.D. 1990*

Susan Gladstone and Arthur Ellison

by their attorneys

UPTON, SANDERS & SMITH *Indorser*

By Gary B. Richardson

10 Centre St., Box 1109, Concord, NH 03302-1109

Marshall A. Buttrick  
Clerk

*Appendix A*

THE STATE OF NEW HAMPSHIRE

RIMACK, SS.

SUPERIOR COURT

WRIT OF SUMMONS

Susan Gladstone and Arthur Ellison  
both of 59 Rumford Street  
Concord, N.H. 03301

v.

Carol Leonard-McKinney, Administratrix of the Estate of Kenneth  
L. McKinney, Jr., M.D. of Hopkinton Rd., Hopkinton, N.H.

and

Kenneth L. McKinney, Jr., M.D. Professional Association, a  
professional association having a place of business at 33 Warren  
Street, Concord, N.H. 03301

*To the Sheriff of any County or his Deputy*

We Command You To Summon

if to be found in your precinct, to appear at the SUPERIOR  
COURT at Concord in said County of Merrimac, on the first  
Tuesday of April 1988, to answer to

COUNT I

In a plea of the case for that at all times relevant to this  
complaint Kenneth L. McKinney, M.D. (hereinafter "McKinney")  
was licensed to practice medicine in the State of New Hampshire,



*Appendix A*

held himself out as a specialist in the areas of obstetrics and gynecology, and acted as an employee, officer and director of Kenneth L. McKinney, Jr., M.D., Professional Association; that in August of 1984 the plaintiff, Susan Gladstone, employed McKinney to treat her for a fibroid tumor in her uterus and to perform a hysterectomy; that in endeavoring to perform said hysterectomy McKinney did not exercise the due care ordinarily exercised by other gynecologists in his profession in that he failed to adequately tie off the blood vessels to the uterus, failed to inform the plaintiff of the risks of such a procedure such as a contaminated blood transfusion and failed to take adequate precautions to avoid those risks; that as a proximate result, the plaintiff, Susan Gladstone, suffered severe abdominal bleeding which required a second operation and blood transfusions; that the blood received by Susan Gladstone was contaminated with the virus associated with Acquired Immune Deficiency Syndrome (A.I.D.S.) and Susan Gladstone has developed symptoms consistent with said disease; that as a further result, Susan Gladstone has suffered loss of enjoyment of life, loss of probable life expectancy, extreme mental anguish and past, present and future pain and suffering, medical costs, loss of earning capacity and loss of wages all to her damage as she says greatly in excess of the jurisdictional minimum requirements of the Superior Court together with interest and costs.

**COUNT II**

In a plea of the case for that Arthur Ellison is the husband of Susan Gladstone having been married to her on June 8, 1973 and they are the parents of two children, Jerome, age 11, and Anna, age 8; that as a result of the injuries sustained by Susan Gladstone, as alleged in Count I, Arthur Ellison has suffered the loss of the enjoyment of his wife's companionship, consortium and family relationship all to his damage as he says in excess of

*Appendix A*

the jurisdictional minimum requirements of the Superior Court together with interest and costs.

**COUNT III**

In a plea of the case for that the allegations of Counts I & II are realleged and incorporated by reference; that the plaintiffs did not become aware that Susan Gladstone had received contaminated blood until August of 1986; that between August of 1984 and August of 1986 the plaintiffs engaged in sexual intercourse; that as a result Arthur Ellison has been exposed to the A.I.D.S. virus although it has not yet been positively determined whether or not Arthur Ellison has contracted A.I.D.S.; however at the very least the exposure to A.I.D.S. has caused Arthur Ellison extreme mental anguish and emotional distress as approximate result of the defendant's negligence all to his damage as he says in excess of the jurisdictional minimum requirements of the Superior Court together with interest and costs.

*Appendix A*

THE STATE OF NEW HAMPSHIRE

MERRIMACK. SS.

SUPERIOR COURT

WRIT OF SUMMONS

Susan Gladstone and Arthur Ellison  
59 Rumford Street  
Concord, NH 03301

Auto Suture Company, a Division of United States Surgical Corporation, a New York Corporation having a business address of 150 Glover Avenue, Norwalk, Conn. 06856

*To the Sheriff of any County or his Deputy*

We Command You To Summon

if to be found in your precinct, to appear at the SUPERIOR COURT at Concord in said County of Merrimack, on the first Tuesday of August 1988.

COUNT I — Products Liability

In a plea of the law for that on or about August 22, 1984 and prior thereto the defendant, Auto Suture Company, a division of United States Surgical Corporation, was engaged in the business of selling surgical staplers; that on said date a surgical stapler sold by the defendant was used by Kenneth L. McKinney, Jr., M.D. during a hysterectomy performed on the plaintiff, Susan Gladstone; that said stapler was in a defective condition unreasonably dangerous to the plaintiff Susan Gladstone in that the device failed to adequately ligate the blood vessels, the device

*Appendix A*

was sold without adequate warnings to the patient and instructions to the physician and the device was sold for use without ensuring that the physician using it had training in its use; that at the time of its use said stapler was without substantial change in the condition in which it was sold; that as such the defendant is legally responsible for the damages thereby caused; that as a result of the inadequate ligation of the blood vessels the plaintiff, Susan Gladstone, suffered severe abdominal bleeding which required a second operation and blood transfusions; that the blood received by Susan Gladstone was contaminated with the virus associated with Acquired Immune Deficiency Syndrome (A.I.D.S.) and Susan Gladstone has developed symptoms consistent with said disease; that as a further result, Susan Gladstone has suffered loss of enjoyment of life, loss of probable life expectancy, extreme mental anguish and past, present and future pain and suffering, medical costs, loss of earning capacity and loss of wages all to her damage as she says greatly in excess of the jurisdictional minimum requirements of the Superior Court together with interest and costs.

**COUNT II — Negligence**

In a plea of the case for the allegations of Count I are realleged and incorporated by reference; that the failure to give adequate warnings to the patient and instructions to the physician in the use of the surgical stapler and the failure to ensure that the physician using said device was trained in its use was negligent and violated a duty of ordinary care owed to the plaintiff, Susan Gladstone, suffered the damages described in Count I all to her damage as she says together with interest and costs in an amount greatly in excess of the jurisdictional minimum requirements of the Superior Court.

**APPENDIX B — MOTION FOR STAY OF PROCEEDINGS  
DATED AUGUST 16, 1991**

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF NEW HAMPSHIRE

Civil Action  
No. C.90-145-D

S.G. and A.E.,

Plaintiffs

v.

American National Red Cross (sued herein under the name  
"American Red-Cross Blood Services Vermont-New Hampshire  
Region, a Division of American Red Cross"),

Defendant

**DEFENDANT'S MOTION FOR STAY OF PROCEEDINGS  
PENDING APPEAL TO UNITED STATES SUPREME COURT**

The American National Red Cross ("Red Cross"), defendant, moves this Court for a stay of further proceedings in this case, to permit the Red Cross to petition the United States Supreme Court for a writ of certiorari to resolve what is now a split in United States Courts of Appeals as to whether the Red Cross's congressional charter confers original federal jurisdiction on actions involving the Red Cross. Unless such a stay is granted, the issue may be mooted by remand of the case to New Hampshire Superior Court, thereby depriving the Red Cross of the opportunity to present the issue to the United States Supreme Court. In support

*Appendix B*

of this Motion, the Red Cross states as follows:

1. On July 24, 1991, the United States Court of Appeals for the First Circuit reversed the ruling of this Court that 36 U.S.C. § 2 confers original federal jurisdiction on actions involving the Red Cross, a decision which is contrary to the decision reached by the United States Court of Appeals for the Eighth Circuit. Compare *S.G. & A.E. v. American National Red Cross*, No. 90-1873 (1st Cir., July 24, 1991) with *Kaiser v. Memorial Blood Center*, No. 89-5533 (8th Cir., April 10, 1991). In addition, the First Circuit remanded *S.G. & A.E.* to this Court to determine whether joinder of nondiverse parties is appropriate so as to destroy diversity, the other basis for federal jurisdiction, and thus require remand to the state court. *S.G. & A.E.*, slip op. at 2, 19.

2. The Red Cross moved the First Circuit for a stay of its mandate pursuant to Federal Rule of Appellate Procedure 41 to assure that the Red Cross would have time to petition the Supreme Court for a writ of certiorari. Appellee's Motion for stay of Mandate, August 9, 1991 (attached). On August 13, 1991, the First Circuit declined to enter a stay, apparently because the matter was being remanded to this Court for further proceedings on the issue of joinder and diversity, and because the Red Cross would have the opportunity to seek a stay of such further proceedings from this Court.

3. Because this Court has previously announced how it would resolve the joinder and diversity issues (Order of June 19, 1990 at 4, modifying Order of May 24, 1991), the Red Cross is concerned that without a stay of proceedings, this Court may immediately resolve the diversity issue and remand the action to state court. Such a remand to state court would foreclose the Red Cross from appealing the charter issue to the United States



*Appendix B*

Supreme Court, because an order to remand is unappealable under the circumstances of this case. See 28 U.S.C. § 1447(d).

4. At a minimum, the Red Cross believes the joinder and remand issue should be briefed in light of the Supreme Court's recent decision, *Freeport-McMoRan, Inc. et al. v. K.N. Energy, Inc.*, 111 S. Ct. 858, 860 (Feb. 19, 1991), which holds that "[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action." Although *Freeport-McMoRan* does not deal specifically with removal issues under 28 U.S.C. § 1447(e), the court does cite with approval an earlier Supreme Court decision which held that jurisdiction is not "defeated by the intervention, by leave of court, of a party whose presence is not *essential* to a decision of the controversy between the original parties . . . ." (Emphasis added.) Accordingly, it would appear that 28 U.S.C. § 1447(e) is not to be applied to permit joinder and remand except where the party to be joined is indispensable. This construction is also consistent with the legislative history of 1447(e), which provides that "[j]oinder coupled with remand may be more attractive than either dismissal under Civil Rule 19(b) or denial of joinder." H.R. REP. No. 889, 100th Cong., 2d Sess. 72-73, *reprinted in* 1988 U.S. Code Cong. & Ad. News, 5982, 6033. (Rule 19(d) deals specifically with indispensable parties.)

5. The Red Cross represents to this Court that it is in the process of preparing a petition for certiorari to the Supreme Court and intends to file the petition promptly, so that the Supreme Court will have the opportunity to decide whether to grant the petition within this calendar year.

6. As this Court held in its Order of June 19, 1990, the issue of whether the Red Cross charter confers original federal

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jurisdiction to permit removal is "one of those 'rare cases' which cry out" for appellate resolution. Moreover, the First Circuit recognized "the importance of the jurisdictional issue presented, especially in light of the increasing litigation concerning the transmission of HIV virus through the transfusion of tainted blood." *S.G. & A.E.*, slip op. at 1. While reaching a conclusion different from that of the Eighth Circuit, the First Circuit acknowledged that "[t]his is not to say that the question whether Congress intended to convert all Red Cross cases into federal question cases when it amended the Red Cross Charter is easily decided." *Id.* at 18.

7. Numerous courts throughout the country are continuing to face this jurisdictional issue, and they continue to reach divergent decisions. It would be especially regrettable if Supreme Court review were to be frustrated by remand of the action to state court before the Supreme Court could be given the opportunity to determine the issue definitively.

WHEREFORE, the American National Red Cross respectfully moves this Court to stay further proceedings in the case to permit the Red Cross to file a timely petition in the United States Supreme Court for a writ of certiorari and to permit the Supreme Court to take appropriate action on the petition. In the event this Court is not inclined to stay proceedings, the Red Cross moves, in the alternative, for seven days' advance notice to permit it to seek emergency relief from the Supreme Court. Alternative proposed Orders are attached.

The Red Cross has made a good faith attempt, pursuant to Local Rule 11(c), to obtain concurrence of the plaintiffs in the relief sought by this Motion, but has been unable to obtain such concurrence. As the present Motion is addressed to the Court's

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discretion, no memorandum with citations of supporting authorities is being submitted.

AMERICAN NATIONAL RED  
CROSS

By Its Attorneys,  
SULLOWAY HOLLIS & SODEN

By s/Irvin Gordon  
Irvin D. Gordon (0962)  
9 Capitol Street  
Concord, NH 03302-1256  
(603) 224-2341

DATE: August 16, 1991

**APPENDIX C — ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF NEW  
HAMPSHIRE DATED SEPTEMBER 24, 1991**

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE**

Civil No. 90-145-D

*Susan Gladstone;*  
*Arthur Ellison*

v.

*American National Red Cross*

**ORDER**

On July 24, 1991, the Court of Appeals, acting on interlocutory appeal, reversed and remanded with respect to this court's order of May 24, 1990. Document no. 10. *S.G. & A.E. v. American Nat'l Red Cross*, No. 90-1873 (1st Cir. July 24, 1991). In such order, this court had held that 36 U.S.C. § 2 vested exclusive jurisdiction in actions to which American Red Cross ("Red Cross") is a party in federal courts. The mandate of the court of appeals issued on August 21, 1991.<sup>1</sup>

In the interim, however, Red Cross moved the court for a stay of proceedings pending a petition for certiorari to the Supreme Court of the United States. Document no. 23. Alternatively, Red Cross sought a stay by this court of seven days to allow it to

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1. The mandate was here received on August 22, 1991.

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apply to a justice of the Supreme Court for such relief.<sup>2</sup>

Simultaneously, plaintiffs filed their second motion to join parties and remand this matter to state court. Document no. 24.

Under the provisions of 28 U.S.C. § 2101(f), a stay pending an application for certiorari to the Supreme Court "may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . ." The courts which have considered this statute have ruled that it vests authority to grant a stay in the court of appeals or a justice of the Supreme Court. *In re Stumes*, 681 F.2d 524, 525 (8th Cir. 1982); *Gander v. FMC Corp.*, 733 F. Supp. 1346, 1347 (E.D. Mo. 1990) (and cases therein cited). The district court is without jurisdiction to grant a stay of execution of its judgment pending a defendant's application for certiorari. *Id.* Red Cross has moved for a stay from the court of appeals, but this motion has been denied. Inasmuch as this court lacks jurisdiction to grant the relief of a stay, the motion of Red Cross seeking such relief must also be and is herewith denied.

With respect to the plaintiffs' second motion, it is true that, were it not for the jurisdictional issues raised by 36 U.S.C. § 2, this court had previously ruled, upon balancing the requisite factors, that it would grant joinder and order remand. Document no. 10, at 4-6. The court perceives no changes in circumstances which require it to reconsider such ruling, and, accordingly, it

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2. The proposed petition for certiorari is grounded on a dispute between circuits. As noted in *S.G. & A.E. v. American Nat'l Red Cross*, *supra*, slip op. at 5, 6, the Eighth Circuit has held that the "sue and be sued" language in 36 U.S.C. § 2 vests original federal jurisdiction over Red Cross. See *Kaiser v. Memorial Blood Center*, No. 89-5533 (8th Cir. Apr. 10, 1991).

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herewith grants the second motion for joinder and remand. Accordingly, pursuant to the mandate of the court of appeals, joinder of parties is granted, and this case is herewith remanded to the Superior Court of Merrimack County, New Hampshire.

SO ORDERED.

s/ Shane Devine  
Chief Judge  
United States District Court

September 24, 1991

cc: Gary B. Richardson, Esq.  
Irvin D. Gordon, Esq.  
Bruce M. Chadwick, Esq.



**APPENDIX D—SLIP OPINION IN *WALKER V. AMERICAN  
NATIONAL RED CROSS* DATED AUGUST 16, 1991**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 91-0749  
Judge George H. Revercomb

BESSIE WALKER, Personal Representative of the estate of  
TANYA M. TAYLOR,

Plaintiff,

v.

AMERICAN NATIONAL RED CROSS, et al.,

Defendants.

**MEMORANDUM AND ORDER**

The plaintiff, Bessie Walker, alleges that the decedent, Tanya Taylor, contracted Acquired Immune Deficiency Syndrome ("AIDS") as the result of receiving a blood transfusion that was contaminated with the human immunodeficiency virus ("HIV"). The plaintiff alleges that the defendant, the American National Red Cross, was negligent in its testing and screening of blood received by Ms. Taylor. The plaintiff filed suit in the Superior Court of the District of Columbia on March 1, 1990 and the American Red Cross filed a notice of removal in this court on April 10, 1991.

The plaintiff filed a motion to remand the case to the Superior Court, the defendant filed an opposition as well as a supplement

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to its opposition, and argument was heard on the motion on May 10, 1991.

Under the removal statute, 28 U.S.C. § 1441(a), this case would be properly removed to this Court if it would have original jurisdiction over the action. The defendant argues that the Red Cross Charter, 36 U.S.C. § 2 (1988) confers federal jurisdiction in all cases involving the Red Cross. 36 U.S.C. § 2 states that the Red Cross shall have "the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States . . ." The plaintiff argues that this language does not create original jurisdiction, but is merely a grant of corporate power.

The courts have been split on this issue of whether Congress intended that 36 U.S.C. § 2 create original jurisdiction in the federal courts. Judges Penn and Harold Greene of this Court have held that 36 U.S.C. § 2 does not confer original jurisdiction in the federal courts for actions to which the Red Cross is a party.<sup>1</sup> On the other hand, the United States Court of Appeals for the Eighth Circuit, in the first appellate decision addressing this issue, held that the clause does grant federal jurisdiction. *Kaiser v. Memorial Blood Center*, No. 89-5533, slip op. (8th Cir. Apr. 11, 1991).<sup>2</sup>

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1. See *Walton v. Howard University*, 638 F. Supp. 826 (D.D.C. 1987); *Okoro v. Children's Hospital*, No. 87-2114 (D.D.C. July 12, 1988); *Ray v. American National Red Cross*, Civil Action No. 90-1882, slip op. (D.D.C. Oct. 19, 1990); *Boutar v. American National Red Cross and American Red Cross*, Civil Action No. 90-3155, slip op. (D.D.C. April 9, 1991).

2. In addition, both parties have cited numerous cases that support their positions. The courts are almost evenly split on this issue.

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The Supreme Court has considered whether sue and be sued language confers federal jurisdiction. In *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809), the Supreme Court held that the language "sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever . . ." was insufficient to create federal jurisdiction. In *Osborn v. Bank of the United States*, 22 U.S. 738, 817 (1824), the Supreme Court held that the language "to sue and be sued, . . . in all state courts having competent jurisdiction, and in any circuit court of the United States" explicitly granted jurisdiction in the circuit courts to hear any case in which the bank was a party. The Court stated that "general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the courts of the United States." *Id.* Continuing this rationale in *Bankers Trust Co. v. Texas and Pac. Ry.*, 241 U.S. 295 (1916), the Court found that the statute, which stated "shall be able to sue and be sued . . . in all courts of law and equity within the United States," did not intend to confer jurisdiction upon any court.

In 1942, the Supreme Court in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942), allowed the F.D.I.C. to sue in federal court pursuant to the corporation's charter, 12 U.S.C. § 1829. The defendants argue that the language in this charter, "sue or be sued in any court of law or equity, State or Federal," is almost identical to the language in the Red Cross charter. However, the F.D.I.C. charter contains subsequent language, referenced by the Supreme Court in *D'Oench*, 315 U.S. at 455, which expressly confers federal jurisdiction on the F.D.I.C. 12 U.S.C. § 1819 (1935) provided:

"To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All

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suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may . . . remove any such action, suit, or proceeding from a State court to the United States district court.'''

It is this subsequent language that creates the right to removal to federal court of actions against the F.D.I.C.<sup>4</sup> Thus, it is obvious that Congress knew how to create original jurisdiction in the F.D.I.C. in 1935. Yet, Congress did not specifically include this type of language in the Red Cross charter's amendment in 1947. Absent similar language specifically conferring federal jurisdiction upon the Red Cross, the Court finds that 36 U.S.C. § 2 was merely a grant of corporate authority and not an explicit creation of federal jurisdiction.

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3. 12 U.S.C. § 1819 presently reads:

(b)(2)(A) . . . all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(b)(2)(B) . . . the Corporation may . . . remove any action, suit, or proceeding from a State court to the appropriate United States district court.

Section D of the statute specifies actions in which the FDIC would not have federal jurisdiction.

4. See *Jeanne, et al. v. The Hawkes Hospital of Mt. Carmel, et al.*, No. C-2-87-509 (S.C. Ohio 1988).

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The defendants argue that the subsequent language in the F.D.I.C. charter was not necessary to confer jurisdiction and that the language used in *Osborn* should be considered to be the minimum language required. However, the Court finds that the language used in the Red Cross charter does not even meet the minimum requirements of *Osborn*. At the time the charter in *Osborn* was written, circuit courts of the United States were the federal courts of original jurisdiction and the charter stated that the bank shall be able to sue and be sued "in any circuit court of the United States." Unlike the charter in *Osborn*, the Red Cross charter does not specify that the Red Cross shall be able to sue or be sued in federal courts of original jurisdiction. If the Court interpreted the Red Cross charter as the defendant suggests it should, the Red Cross would also be permitted to sue or be sued in the Supreme Court, a Circuit Court of Appeals, or the Claims Court, which are federal courts of law and equity.<sup>5</sup> The Court refuses to adopt this interpretation.

The defendant also urges the Court to rely on legislative history that it asserts supports a finding that 36 U.S.C. § 2 confers federal jurisdiction. Specifically, the defendant cites to a report by a Red Cross advisory committee, the "Harriman Committee." S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947). However, contrary to the defendant's assertion, Recommendation No. 22 does not make clear that the purpose of the clause was to confer original jurisdiction upon the Red Cross solely as a result of this statute. Instead, the recommendation simply reiterates the power of the Red Cross as a corporation to sue and be sued, similar to any other litigant, in the federal courts if federal jurisdiction applies,

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5. See *Boutar v. American Red Cross*, No. 90-3155 (D.D.C. April 9, 1991).

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such as in the instance of diversity or the presence of a federal question.

In addition, as pointed out by the court in *Walton v. Howard University*, 683 F. Supp. 826, 829 (D.D.C. 1987), the Senate hearing on the charter amendments does not indicate that the committee intended to grant original federal jurisdiction for suits involving the Red Cross. See *American National Red Cross: Hearing on S. 591 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 7-11 (1947). Instead, the discussion centered on the issue of whether the provision actually limited the corporate powers of the Red Cross by not giving it the ability to litigate in foreign courts.

Based upon the foregoing reasons, the Court finds that 36 U.S.C. § 2 is merely a grant of corporate power. It does not explicitly confer federal jurisdiction upon the Red Cross as is required under *Osborn*. At the time the amendment was added, Congress was well aware of the subsequent language referred to in *D'Oench*, which explicitly conferred federal jurisdiction upon the F.D.I.C. Congress chose not to use this language. Therefore, this Court agrees with Judge Penn and Judge Harold Greene that original jurisdiction is not conferred on the Red Cross by means of its charter. The opinion from the United States Court of Appeals for the Eighth Circuit, *Kaiser v. Memorial Blood Center, supra*, which does not state the reasons for its conclusions, does not persuade this Court otherwise.

it is therefore ORDERED that the Motion to Remand is GRANTED.

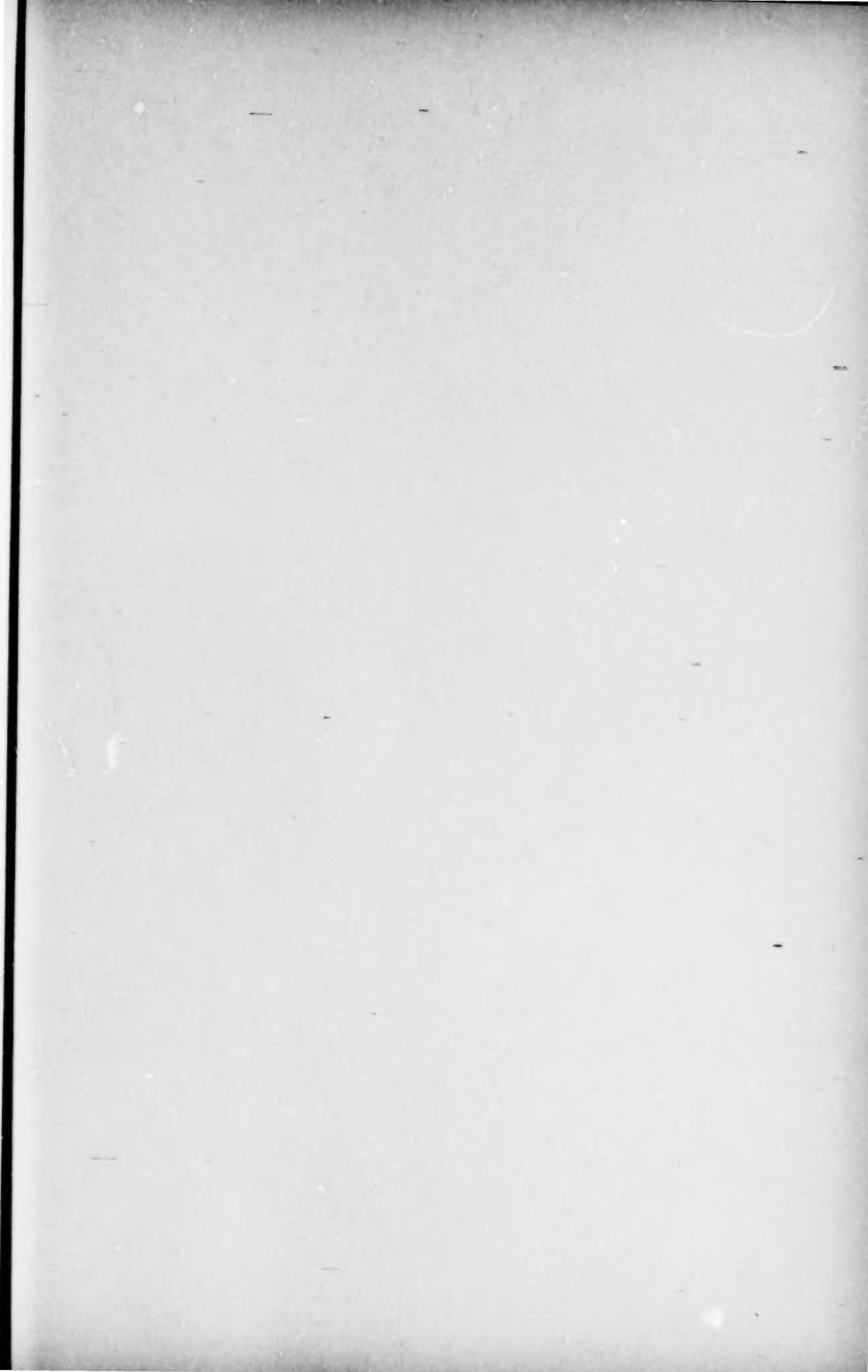
Dated: May 10, 1991



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s/ George H. Revercomb  
George H. Revercomb  
United States District Judge



**In the Supreme Court of the United States**

OCTOBER TERM, 1991

AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E., RESPONDENTS

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit

REPLY BRIEF FOR THE PETITIONER

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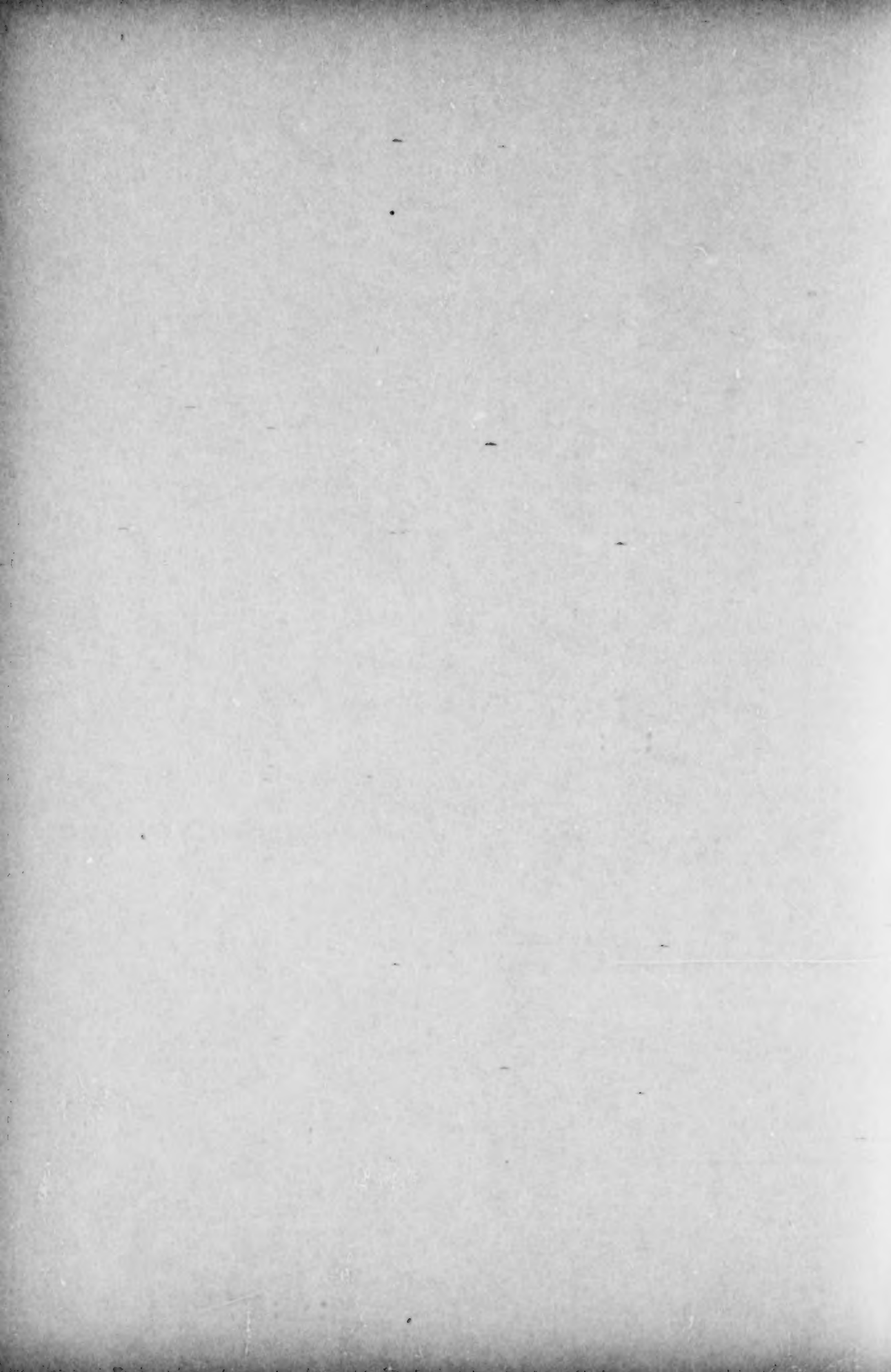
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# **In the Supreme Court of the United States**

OCTOBER TERM, 1991

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No. 91-594

AMERICAN NATIONAL RED CROSS, PETITIONER

*v.*

S.G. AND A.E., RESPONDENTS

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit**

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## **REPLY BRIEF FOR THE PETITIONER**

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In our petition, we demonstrated that the courts of appeals and the district courts are deeply divided over whether the sue-and-be-sued clause in the Red Cross charter confers federal jurisdiction over actions involving the Red Cross. The petition demonstrated that the division has continued to deepen, contrary to respondents' unfounded supposition (Br. in Opp. 7) that the decision below could somehow promote uniformity. Finally, we also explained that the decision below cannot be reconciled with *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and its progeny, and that it threatens to undermine established law concerning jurisdiction over federal agencies and instrumentalities other than the Red Cross.

Respondents concede that the lower federal courts are in complete disarray with respect to the jurisdic-

tional issue raised in the petition; nevertheless, they offer a laundry list of arguments to dissuade this Court from resolving the issue. All of those arguments are misguided.

1. Respondents begin by asserting (Br. in Opp. 3-7) that, because of 28 U.S.C. § 1447(d), this Court lacks jurisdiction. If respondents mean to suggest that Section 1447(d) generally precludes Supreme Court review of decisions of the courts of appeals directing remands to state courts, their position is contrary to hornbook law: “if \* \* \* the court of appeals holds that the case was not properly removed, and orders remand, this order is not within the statutory ban on review \* \* \* and may be considered by the Supreme Court.” 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3740, at 598 (1985); see also 1A J. Moore & B. Ringle, *Moore’s Federal Practice* ¶ 0.169[2.-1], at 697 (1990) (Section 1447(d) applies only to remand order by the district court and “d[oes] not preclude review by the Supreme Court of an order to remand made by the court of appeals”); *Chicago, Burlington & Quincy Railway v. Willard*, 220 U.S. 413 (1911) (reviewing appellate court’s remand order).

If respondents are suggesting more narrowly that the district court’s remand order in this case, entered after the court of appeals ruled, strips this Court of jurisdiction, then they are also wrong. In making that argument, respondents have chosen to ignore *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-467 (1947), where a unanimous Court rejected the identical contention that a remand to the state court defeated this Court’s jurisdiction.<sup>1</sup> Citing

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<sup>1</sup> Respondents accuse the Red Cross of “evasive maneuvering” (Br. in Opp. 5) and suggest that the case must be

the predecessor to Section 1447(d), the Court wrote that “no such limitation affects our authority to review an action of the Circuit Court of Appeals, directing a remand to state court.” *Id.* at 467. And, although the mandate of the court of appeals had issued and the district court had remanded the case (*id.* at 466), that fact could not “defeat this Court’s jurisdiction” (*id.* at 467). Jurisdiction in the present case is controlled by *Aetna*.<sup>2</sup>

A district court’s remand order does not moot the issue whether remand is proper. The FDIC, for example, is statutorily authorized to appeal “any order of remand entered by any United States district court” (12 U.S.C. § 1819(b)(2)(C)), and the courts have applied that provision without any hesitancy over the existence of an Article III case or controversy. *E.g.*, *NCNB Texas National Bank v. Fennell*, 942 F.2d 934 (5th Cir. 1991). Similarly, there is

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deemed unreviewable because the Red Cross previously suggested that it might be. Whether the case is reviewable here is a question of law, however, and that question is controlled by *Aetna*. Precisely so that respondents would be aware of *Aetna* and would not mistakenly assert that the Red Cross concedes the unreviewability of this case, petitioner’s counsel alerted respondents to *Aetna* by letter at the time the petition for certiorari was filed. See Appendix, *infra*. Respondents nevertheless have failed to address, much less attempt to distinguish, that controlling case in their brief in opposition.

<sup>2</sup> See also *Gay v. Ruff*, 292 U.S. 25, 29-31 (1934) (certiorari jurisdiction unaffected by circuit court’s order to remand case to state court); cf. *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (citing *Aetna*) (jurisdiction not defeated by failure to obtain a stay of circuit court mandate); *Graddick v. Newman*, 453 U.S. 928, 945 n.1 (1981) (opinion of Rehnquist, J.) (citing *Aetna*) (issuance of mandate does not bar appellate review); *Carr v. Zaja*, 283 U.S. 52, 53 (1931) (same).

no jurisdictional obstacle to review of this case in this Court.

2. Respondents next contend (Br. in Opp. 6-7) that there is insufficient conflict among the lower federal courts to justify granting certiorari in this case. Respondents concede, however, as they must, that more than 40 courts have interpreted 36 U.S.C. § 2, and that roughly half conclude that it creates federal jurisdiction while the others conclude that it does not. In fact, the issue in this case has divided not only the courts of appeals, but also the district courts and indeed individual judicial districts. See Pet. 10-12. There is no reason to believe that the lower courts will somehow harmonize their views of 36 U.S.C. § 2 without help from this Court, nor is it plausible to credit respondents' speculative hope (Br. in Opp. 7) that the decision below could promote uniformity among the courts. To the contrary, the decision below exacerbated the existing divisions by creating a square circuit split. Moreover, district courts have continued to interpret the Red Cross charter in contradictory ways even after the First Circuit's ruling. See Pet. 10-11 nn.4 & 5 (citing 6 cases, divided 4-2, after the decision below); see also *Faust v. Red Cross*, No. C 91-20379 (N.D. Cal. Oct. 3, 1991) (resolving issue against Red Cross); *Jones v. American Red Cross*, Civ. No. 91-686MA (D. Or. Sept. 24, 1991) (same). The problem is a recurring one that cries out for resolution through certiorari.

The district and appellate courts have ventilated the present issue thoroughly, but they have come to an impasse. And, as we explained in the petition, there are systemic reasons that inhibit appellate review of the jurisdictional issue. Pet. 12-13. The

present case affords this Court a rare opportunity to resolve this important issue.

3. Respondents' argument that this Court should decline to exercise jurisdiction solely because of the interlocutory nature of the appeal (Br. in Opp. 8-9) is equally misguided. The Court regularly grants review in civil cases that are in an interlocutory posture when the question presented is jurisdictional. See, e.g., *FSLIC v. Ticktin*, 490 U.S. 82 (1989); *Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947). Indeed, it would be wasteful in the extreme to require parties to litigate a claim to a final judgment if the entire trial could be nullified for lack of jurisdiction.

The reason this Court sometimes declines to review cases in an interlocutory posture is that it will have the opportunity to review those same issues, and any others that may subsequently arise, on review of a later final judgment. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224 n.71 (6th ed. 1986). That rationale has absolutely no application to this case, however. Any final judgment ultimately entered in this case, unless this Court grants certiorari now, will be rendered by a *state* court, and this Court would have no authority to address the issue of federal jurisdiction on a petition for a writ of certiorari to review the judgment of that court. 1A J. Moore & B. Ringle, *supra*, ¶ 0.169[2.-1], at 696 & n.41; *Metropolitan Casualty Insurance Co. v. Stevens*, 312 U.S. 563, 568 (1941); *Missouri Pacific Railway v. Fitzgerald*, 160 U.S. 556, 582 (1896). In this case, unlike other "interlocutory" cases, review must take place now or never.



Respondents also complain (Br. in Opp. 5, 8-9) that the Red Cross is somehow to blame for delaying the resolution of this case by litigating the jurisdictional issue. That argument is misleading and unfair. If respondents genuinely were eager to litigate the case on the merits without regard to the correct resolution of the jurisdictional issue, they could have simply litigated it in federal court instead of moving to remand to state court, and they could have forgone an appeal once the district court ruled against them. Having twice introduced delay into the proceeding by moving to remand and by appealing, respondents are in no position to complain that the Red Cross is exercising its right to press on for resolution of the issue.

Furthermore, although we sympathize with the plight of respondent S.G., the argument that she is suffering from AIDS during the pendency of the case ultimately bolsters rather than undercuts the Red Cross's position that certiorari should be granted. Uncertainty over whether the Red Cross charter creates federal jurisdiction has spawned litigation that has stalled dozens of cases involving claims that the plaintiffs contracted HIV or AIDS as a result of blood transfusions. Prompt, definitive resolution of the jurisdictional dispute would benefit all such claimants, as well as the Red Cross.

4. Respondents' argument that certiorari should be denied because the basis for federal jurisdiction does not appear on the face of the complaint (Br. in Opp. 10-11) is frivolous. (In any event, respondents' argument, even if it had substance, would go to the merits of the question presented and not its cert-worthiness.) The "well-pleaded complaint" doctrine is an interpretation of 28 U.S.C. § 1331 ("arising under" jurisdiction) and has no relevance to cases in



which federal jurisdiction is conferred by a different statute such as 36 U.S.C. § 2. This is not a case where the defendant seeks federal jurisdiction pursuant to an affirmative defense or a claim of immunity; rather, the Red Cross's right to a federal forum is based on its *status*, which is implicated whenever suit is brought against it. The Red Cross is entitled to litigate in federal court whether the claims raised by respondents are based on state or federal law.

5. Respondents next suggest (Br. in Opp. 12-13) that the jurisdictional issue presented in this case is not important enough to warrant a grant of certiorari and that the issue is of purely "academic" interest. Both of these contentions are meritless. In the petition (at 23-27) we explained the many reasons why the present issue is important, so it is unnecessary to recapitulate them here. And surely the issue is more than "academic"; scores of litigants are devoting resources to contesting the issue, and cases are being remanded to state court or are proceeding in federal court on the basis of the conflicting decisions. Respondents' contention that review by this Court would not promote uniformity is similarly misconceived. Obviously the resolution of a *jurisdictional* issue will not yield uniform substantive results, because the underlying facts and legal theories will differ in each case. But it is still important that the jurisdictional issue itself be resolved uniformly among federal courts.

Respondents also misunderstand (Br. in Opp. 14) our references to the charter provisions of other federal agencies. Respondents contend that jurisdiction over actions against the federal agencies mentioned in the petition (at 13-14, 26) is provided by 28 U.S.C.

§§ 1345 and 1349, not by the sue-and-be-sued clauses of those agencies. Br. in Opp. 14. But Section 1345, entitled “United States as plaintiff,” applies only to actions brought *by* the United States and its agencies, not actions *against* them. Cf. *Northbrook National Insurance Co. v. Brewer*, 493 U.S. 6, 7 (1989). It is the ability of those agencies *as defendants* to remove actions from state to federal court that is of concern here and is threatened by the decision below. Section 1349 is an arguable grant of jurisdiction only over actions against corporations with “capital stock” that is owned by the United States; it does not apply to agencies, such as HUD, the PBGC, and GNMA, that lack capital stock. Neither Section 1345 nor Section 1349 can substitute for proper interpretation of the charter provisions of federal agencies and instrumentalities.

6. Respondents’ final contention (Br. in Opp. 15-18) is that certiorari should be denied because the decision below is correct. Yet respondents offer nothing more than a rehash of the First Circuit’s reasoning, ignoring the demonstration in our petition that the First Circuit erred in several respects. The arguments made in the petition stand unrebutted.<sup>3</sup>

The question whether the Red Cross charter confers federal jurisdiction over actions involving the Red Cross has generated stark conflict among the

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<sup>3</sup> Furthermore, even if respondents were right, in light of the division of authority in the lower courts the correct course would be for this Court to grant certiorari and affirm, not to deny certiorari; for the implication of respondents’ position is that every federal court that is allowing a Red Cross case to proceed is doing so without jurisdiction, and the maximum possible waste of judicial resources is occurring and will continue until this Court resolves the issue.

lower federal courts and has tied up the resources of litigants and the courts in procedural disputes. The present case affords an excellent opportunity to resolve this issue and forestall still further waste.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1991



APPENDIX A

MAYER, BROWN & PLATT  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006-1882  
202-463-2000

October 1, 1991

Gary B. Richardson, Esquire  
Gilbert Upton, Esquire  
Upton, Saunders & Smith  
10 Centre Street  
P.O. Box 1109  
Concord, New Hampshire 03302-1109

Re: *Red Cross v. S.G. and A.E.*

Dear Messrs. Richardson and Upton:

I enclose three service copies of the petition for a writ of certiorari filed today in the above-captioned case.

In our stay application filed with Justice Souter yesterday, we suggested that this case might become moot if the Supreme Court did not grant a stay and the case was remanded to state court. Subsequent research has disclosed that the Supreme Court retains jurisdiction to review a court of appeals' judgment directing a remand to state court, even if the district court has already remanded the case. *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-467 (1947). Accordingly, we believe that this case is not moot, and we will continue to pursue review in the Supreme Court.

Sincerely,

/s/ Roy T. Englert, Jr.  
ROY T. ENGLERT, JR.

Enclosures

No. 91-594

Supreme Court, U.S.

FILED

JAN 13 1992

OFFICE OF THE CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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AMERICAN NATIONAL RED CROSS, PETITIONER

*v.*

S.G. AND A.E.

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER

---

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### QUESTION PRESENTED

Whether 36 U.S.C. 2, which provides that petitioner shall have "the power to sue and be sued in courts of law and equity, State or Federal," vests federal courts with original jurisdiction over actions to which petitioner is a party.



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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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No. 91-594

AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E.

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

---

**INTEREST OF THE UNITED STATES**

This case involves the right of the American National Red Cross (the Red Cross) to remove to federal court cases brought against it in state courts. The case implicates two important interests of the United States. First, as this Court has recognized, the Red Cross is important to the government of the United States because of the Red Cross's obligation "to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need." *Department of Employment v. United States*, 385 U.S. 355, 359 (1966). Accordingly, the United States in the past has appeared in this Court to de-

fend the prerogatives Congress has granted to the Red Cross.

Second, several statutes governing the capacities of important federal instrumentalities contain language similar in some respects to the language in the Red Cross's charter at issue in this case. The United States has an interest in ensuring that such language is interpreted in a way that will allow those federal instrumentalities to remove to federal court cases brought against them in state courts.

### STATEMENT

1. In March 1990, respondents instituted this suit in the Superior Court of Merrimack County, New Hampshire, contending that petitioner was responsible for injuries respondent A.E. sustained during a surgical operation in 1984. Petitioner removed the suit to the United States District Court for the District of New Hampshire under 28 U.S.C. 1441(a). Petitioner contended that the federal court would have had original jurisdiction over the case pursuant to 36 U.S.C. 2, which provides that petitioner shall have "the power to sue and be sued in courts of law and equity, State or Federal."<sup>1</sup>

2. The district court held that it had jurisdiction. Pet. App. 18a-25a. Relying on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), in

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<sup>1</sup> Section 1441(a) provides for removal jurisdiction only in cases where the action brought in state court is one "of which the district courts of the United States have original jurisdiction." Accordingly, removal jurisdiction was proper only if the federal district court would have had jurisdiction over the case as an original matter. See 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3721 (2d ed. 1985).



which this Court held that similar language in the charter of the second Bank of the United States established federal jurisdiction over actions against the Bank, the court concluded that 36 U.S.C. 2 granted federal jurisdiction over all cases to which petitioner is a party. Pet. App. 24a. Recognizing the importance of the issue, the district court certified the decision for interlocutory appeal under 28 U.S.C. 1292(b). *Id.* at 26a-30a.

3. The court of appeals reversed. Pet. App. 1a-16a. It noted the authority of *Osborn* (*id.* at 5a-7a), but concluded that *Osborn* did not apply to petitioner because petitioner's charter is worded differently than the charter at issue in *Osborn*. First, the court of appeals noted that the charter in *Osborn* referred to "state courts having competent jurisdiction." *Id.* at 9a (emphasis omitted) (quoting *Osborn*, 22 U.S. (9 Wheat.) at 817). In the court's view, the lack of a reference to "jurisdiction" in petitioner's charter suggested that Congress was not concerned with jurisdiction when it crafted the Red Cross's charter. Second, the court noted that the Red Cross's charter refers to a right to sue in federal and state courts generally, whereas the charter at issue in *Osborn* referred more specifically to the courts in which the power to sue could be exercised. Pet. App. 10a; see 22 U.S. (9 Wheat.) at 817. The court concluded that the lack of reference to any particular courts supported its conclusion that Congress intended petitioner's charter to grant only the capacity to sue, without granting jurisdiction to any particular court. Pet. App. 10a. Finally, the court of appeals concluded that the legislative history of 36 U.S.C. 2 supported its conclusion that the charter did not grant jurisdiction because that history "evinces no clear intent

on the part of Congress to confer original jurisdiction." Pet. App. 12a. Accordingly, the court reversed the district court's decision and remanded with instructions to remand the case to state court.

### SUMMARY OF ARGUMENT

This Court's decisions have established a clear rule that congressional charters provide for original jurisdiction in the federal courts whenever they specifically grant a right to sue and be sued in federal courts. In *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85-86 (1809), and *Bankers Trust Company v. Texas & Pacific Railway*, 241 U.S. 295, 303-305 (1916), this Court concluded that charters with only a general reference to "courts of record" or to "courts of law and equity" would not provide for original federal jurisdiction. By contrast, in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817-818 (1824), and in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447, 455-456 (1942), the Court concluded that charters referring to the "circuit courts of the United States" or to all courts, "State or Federal," did provide for original federal jurisdiction.

The Red Cross's charter grants it the power to sue and be sued in all courts, "State or Federal"; it consequently should be construed to provide for original federal jurisdiction over cases involving petitioner. Congress employed this language after this Court had found the language sufficient to vest federal jurisdiction. Accordingly, this Court should follow its earlier cases and give that effect to the language in the Red Cross's charter.

## ARGUMENT

### THE LANGUAGE CONGRESS USED IN PETITIONER'S CHARTER IS SUFFICIENT TO ESTABLISH FEDERAL JURISDICTION

On four separate occasions—all prior to 1947, when Congress enacted the portion of the Red Cross's charter at issue in this case—this Court has considered whether particular language by which Congress had described the powers of federally chartered entities was sufficient to grant the federal courts jurisdiction over actions by and against those entities. The language in two of the cases was held insufficient to grant jurisdiction<sup>2</sup>; the language in the other two cases was found sufficient.<sup>3</sup> A comparison of those cases with the language Congress chose for petitioner's charter demonstrates that the Red Cross's charter should be held sufficient to vest jurisdiction in the federal courts over all cases to which petitioner is a party.

#### I. A CHARTER THAT GRANTS THE SPECIFIC POWER TO SUE AND BE SUED IN THE COURTS OF THE UNITED STATES IS SUFFICIENT TO VEST FEDERAL JURISDICTION OVER ALL CASES TO WHICH THE CHARTERED ENTITY IS A PARTY

This Court first considered whether congressional charters created federal jurisdiction over cases involving federally chartered entities in *Bank of the*

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<sup>2</sup> *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85-86 (1809); *Bankers Trust Co. v. Texas & Pacific Railway*, 241 U.S. 295, 303-305 (1916).

<sup>3</sup> *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817-818 (1824); *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447, 455-456 (1942).

*United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), which presented an action brought in federal court by the Bank of the United States. *Id.* at 62. The Bank's charter provided that the Bank would be "able and capable in law \* \* \* to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever." Act of Feb. 25, 1791, ch. 10, § 3, 1 Stat. 192; see 9 U.S. (5 Cranch) at 85. Writing for a unanimous Court, Chief Justice Marshall concluded that this clause was not sufficient to create federal jurisdiction, explaining that the power granted by this clause "is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognisance of the cause, if brought by individuals." 9 U.S. (5 Cranch) at 85-86. In sum, the charter "evinces the opinion of congress, that the right to sue does not imply a right to sue in the courts of the Union, unless it be expressed." *Id.* at 86.

Only 15 years later, the Court had occasion to consider what type of expression *would* be adequate to confer a right to sue in the courts of the Union. The occasion was *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), involving the second Bank of the United States. The charter of the second Bank varied slightly from the charter at issue in *Deveaux*; Congress had replaced the phrase allowing the first Bank to sue or be sued in "courts of record, or any other place whatsoever," with a more detailed reference allowing suits "in all state courts having competent jurisdiction, and in any circuit court of the United States." Act of Apr. 10, 1816,

ch. 44, § 7, 3 Stat. 269; see *Osborn*, 22 U.S. (9 Wheat.) at 817.<sup>4</sup> The Court (again through Chief Justice Marshall) concluded that the difference in language took the case outside *Deveaux*. In the Court's view, the words of the new charter "admit of but one interpretation" and "cannot be made plainer by explanation." 22 U.S. (9 Wheat.) at 817. Because the words "give, expressly, the right 'to sue and be sued,' 'in every Circuit Court of the United States,'" (*ibid.*) Chief Justice Marshall stated that this charter, unlike the charter in *Deveaux*, granted federal jurisdiction over actions by the Bank. He explained the distinction from *Deveaux* as follows: "[*Deveaux*] amounts only to a declaration, that a general capacity in the Bank to sue, *without mentioning the courts of the Union*, may not give a right to sue in those Courts." 22 U.S. (9 Wheat.) at 818 (emphasis added).<sup>5</sup>

Many years later, the distinction between the charters at issue in *Osborn* and *Deveaux* was clarified further in *Bankers Trust Company v. Texas & Pacific Railway*, 241 U.S. 295 (1916). That case

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<sup>4</sup> The capitalization of the references to "state courts" and the "circuit courts" that appears in the Court's quotation of the statute, see 22 U.S. (9 Wheat.) at 817, does not appear in Statutes at Large. Compare Pet. App. 5a-6a (quoting this passage without the capitalization); *Bankers Trust*, 241 U.S. at 304 (quoting this passage with partial capitalization).

<sup>5</sup> The Court in *Osborn* went on to conclude that the statutory grant of jurisdiction made in the terms of the charter was permissible under Article III of the Constitution, because the existence of the charter gave the case an "ingredient" of federal law, and because that "ingredient" was sufficient to make the case "arise under" federal law for purposes of Article III, Section 2 of the Constitution and thus fall within the constitutionally permissible boundaries of the federal judicial power. 22 U.S. (9 Wheat.) at 823-825.



involved an action against the Texas and Pacific Railway Company, which had been created by a congressional charter granting it the power "to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." Act of Mar. 3, 1871, ch. 122, § 1, 16 Stat. 574; see *Bankers Trust*, 241 U.S. at 303. The Court unanimously concluded that the case was controlled by *Deveaux*, and thus that this provision of the charter did not grant jurisdiction. The Court noted that the differing result in *Osborn* rested on the reference in the *Osborn* charter to power to sue "in all state courts having competent jurisdiction, and in any Circuit Court of the United States," which "amounted to an express grant of jurisdiction to the Circuit Courts." *Bankers Trust*, 241 U.S. at 304.<sup>6</sup>

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<sup>6</sup> The Court went on to consider an alternate basis for jurisdiction, Section 1 of the Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, which granted the federal circuit courts general jurisdiction over cases "arising under" federal law. 241 U.S. at 305-309. The Court noted the constitutional holding in *Osborn*, see note 5, *supra*, that the existence of a federal charter gave all cases involving federally chartered entities a sufficient "ingredient" of federal law to cause the case to "arise under" federal law for purposes of Article III of the Constitution. 241 U.S. at 305-306. Accordingly, the Court concluded, jurisdiction would have been proper under *Osborn* and the 1875 Act absent some other statute limiting jurisdiction. 241 U.S. at 307. Finally, the Court held that jurisdiction was inappropriate, finding that a 1915 statute had withdrawn general "arising-under" jurisdiction under the 1875 Act to the extent the case arose under federal law solely because of the federal incorporation of railroad companies. See *id.* at 307-309; Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 804 ("No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress.") ; see also 13B C. Wright, A. Miller & E. Cooper, *Fed-*



Fifty years ago, the Court's most recent statement regarding the effect on federal jurisdiction of a clause granting a federally chartered entity the power to sue and be sued appeared. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942), involved an action brought by the FDIC, a federally chartered entity that had the power to "sue and be sued, complain and defend, in any court of law or equity, State or Federal." Banking Act of 1933, ch. 89, § 8, 48 Stat. 172; see 315 U.S. at 455. *D'Oench, Duhme* is best known for its recognition of a federal common-law rule protecting the FDIC from claims based on secret agreements not evident from official bank records,<sup>7</sup> but a finding of federal jurisdiction was necessary to the decision of the case. The Court readily found dispositive the language of the charter referring to "Federal" courts.<sup>8</sup> The Court specifically noted that jurisdiction was "not based on diversity of citizenship," but on the language of the

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*eral Practice and Procedure* § 3562, at 20-24 (2d ed. 1984) (discussing the distinction between the broad range of "arising-under" jurisdiction that *Osborn* held the Constitution permitted and the more limited range of "arising-under" jurisdiction Congress actually has vested in the federal courts).

<sup>7</sup> See 315 U.S. at 456-462; see also *Langley v. Federal Deposit Insurance Corporation*, 484 U.S. 86, 92-93 (1987) (discussing *D'Oench, Duhme* and its statutory successor, 12 U.S.C. 1823(e)).

<sup>8</sup> The only significant difference between this charter—which referred to "any court of law or equity, State or Federal"—and the charter found inadequate in *Deveaux*—which referred to "courts of record," see *Deveaux*, 9 U.S. (5 Cranch) at 85—is the inclusion of the phrase "State or Federal" to describe the courts in which the power to sue could be exercised.

FDIC's charter: "Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued 'in any court of law or equity, State or Federal.' " 315 U.S. at 455.

**II. BECAUSE PETITIONER'S CHARTER GRANTS THE POWER TO SUE AND BE SUED IN "COURTS OF LAW OR EQUITY, STATE OR FEDERAL," IT IS SUFFICIENT TO CREATE FEDERAL JURISDICTION OVER CASES TO WHICH PETITIONER IS A PARTY**

A comparison of the language of petitioner's charter to that involved in the cases discussed above, and examination of the circumstances leading to the enactment of that charter, demonstrates that the Red Cross's charter creates federal jurisdiction over cases to which petitioner is a party.

The Red Cross's first congressional charter was enacted in 1905. It granted the "power to sue and be sued in courts of law and equity within the jurisdiction of the United States." Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600. Because this language does not "mention[] the Courts of the Union," *Osborn*, 22 U.S. (9 Wheat.) at 818, it would not have been sufficient under *Osborn* and *Deveaux* to vest federal jurisdiction. Compare *Bankers Trust*, 241 U.S. at 303-304 (finding that a charter referring to "all courts of law and equity within the United States" was "not intended to confer jurisdiction").

This is not surprising. When the charter was passed in 1905, it was well established that another basis for federal jurisdiction existed in cases by or against petitioner. At that time, federal courts had jurisdiction over any action by or against a federally chartered entity, based on (a) the ruling in *Osborn* that cases to which a federally chartered entity is a

party involve an ingredient of federal law sufficient to make such cases arise under federal law for purposes of Article III of the Constitution, see note 5, *supra*, and (b) enactment of Section 1 of the Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, which granted the federal circuit courts jurisdiction over all cases “arising under” federal law. See *Pacific Railroad Removal Cases*, 115 U.S. 1, 11-14 (1885); C. Wright, *Handbook of the Law of Federal Courts* § 17, at 92-93 (4th ed. 1983) (discussing the *Pacific Railroad Removal Cases*).

This changed in 1925. In that year, Congress limited the general federal jurisdiction granted by the 1875 Act, by providing that the district courts would “not have jurisdiction of any [civil] action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, \* \* \* [unless] the United States is the owner of more than one-half of its capital stock.” Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 941 (codified at 28 U.S.C. 1349).<sup>9</sup>

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<sup>9</sup> It seems clear from this Court’s opinion in *Bankers Trust* that the effect of the 1925 Act was to limit only the “arising-under” jurisdiction created by the 1875 Act—which the *Pacific Railroad Removal Cases* had construed to include all cases to which any federally chartered entity was a party, without regard to the language of the entity’s charter—but not jurisdiction under the rule of construction *Osborn* established for congressional charters. In *Bankers Trust*, this Court was confronted with a claim by a federally chartered entity that federal jurisdiction rested on two separate grounds: the language of its charter and the 1875 Act. This Court treated both grounds separately. First, it concluded that the language of the charter was inadequate under the rules established in *Deveaux* and *Osborn*. 241 U.S. at 303-305. Second, it concluded that the 1875 Act was insufficient to establish jurisdiction because of Section 5 of the Act of Jan.

Accordingly, when the Harriman Committee issued its 1946 report recommending revisions to petitioner's charter, it recommended that petitioner's right to sue in the federal courts be clearly stated.<sup>10</sup> Based on this report,<sup>11</sup> Congress revised the language of the pre-existing charter to add the words "State or Federal" to the clause granting the right to sue and be sued, so that the clause now grants the "power to sue and be sued in courts of law and equity, State or Federal." Compare 36 U.S.C. 2 with Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600.

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28, 1915, ch. 22, 38 Stat. 804, which had withdrawn jurisdiction based "upon the ground that [a] railroad company was incorporated under an Act of Congress." See *Bankers Trust*, 241 U.S. at 305-309; note 6, *supra*.

If the 1915 Act directed at railroads—the operational portion of which is worded almost identically with the broader 1925 Act directed at all federally chartered entities—had limited not only general "arising-under" jurisdiction, but also jurisdiction based on specific charter provisions, the Court would have had no occasion to consider the adequacy of the specific charter at issue in *Bankers Trust*, but instead could have found jurisdiction improper simply by relying on the 1915 Act. There is no reason to read any broader effect into the very similar language in the 1925 Act (now codified at 28 U.S.C. 1349).

<sup>10</sup> The report noted that petitioner's "powers [to sue in the Federal Courts] have not been questioned. However, in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the Charter." *Report of the Advisory Committee on Organization* 35-36 (June 11, 1946), C.A. App. 132-133.

<sup>11</sup> See S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947) (Senate Report for 36 U.S.C. 2; noting that the statute was based on the Harriman Committee report); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947) (House Report for 36 U.S.C. 2; noting that the statute was based on the Harriman Committee report).

In light of the decisions of this Court discussed above, there can be little doubt that Congress reasonably believed that the addition of this language would indeed vest federal jurisdiction over actions by or against the Red Cross. The language as revised bears a striking resemblance to that approved only five years earlier in *D'Oench, Duhme*. Compare 36 U.S.C. 2 (granting power to sue and be sued "in courts of law and equity, State or Federal"), with *D'Oench, Duhme*, 315 U.S. at 455 (finding federal jurisdiction based on language authorizing FDIC to sue or be sued "in any court of law or equity, State or Federal"). Moreover, the addition of a specific reference to "Federal" courts closely follows the prescription of Chief Justice Marshall in *Osborn*, namely that charters granting the power to sue and be sued would not vest jurisdiction in the federal courts "without mentioning the Courts of the Union." 22 U.S. (9 Wheat.) at 818.

The court of appeals' reasoning, by contrast, assumes that the amendment was intended to have no effect whatsoever; the charter already granted the capacity to sue in all courts of law and equity within the jurisdiction of the United States, so an additional grant of the capacity to sue in state and federal courts would add nothing. Compare *Moskal v. United States*, 111 S. Ct. 461, 466 (1990) (noting the "established principle that a court should 'give effect, if possible, to every clause and word of a statute'"). Moreover, the basis for the decision of the court of appeals finds no support in the relevant decisions of this Court. The court of appeals' reliance on the absence of references to courts "of competent jurisdiction" or to specific courts—such as the reference to circuit courts of the United States presented by the charter in *Osborn*, see



22 U.S. (9 Wheat.) at 817—flies in the face of this Court's interpretation of a similar clause in *D'Oench, Duhme*, 315 U.S. at 455 (finding jurisdiction based on a clause granting the right to sue in federal courts, although the clause referred neither to courts "of competent jurisdiction" nor to any specific state or federal courts).

To be sure, the court of appeals was correct (Pet. App. 10a-11a) that jurisdiction in *D'Oench, Duhme* also could have rested on the statute granting federal jurisdiction over cases arising under federal law, see 28 U.S.C. 1331, because the FDIC's operative statutes also provided that "suits of a civil nature \* \* \* to which the [FDIC] shall be a party shall be deemed to arise under the laws of the United States." Banking Act of 1935, ch. 614, § 101, 49 Stat. 692; see 315 U.S. at 455 n.2. But whatever other bases for jurisdiction may have been apparent from the record, it remains the case that the *D'Oench, Duhme* Court found jurisdiction proper under the charter. The issue in this case is what meaning should be attributed to the language Congress selected for petitioner's charter. In light of the general presumption that Congress is aware of the law when it drafts statutory language, see, e.g., *Albernaz v. United States*, 450 U.S. 333, 341-342 (1981), it makes perfect sense to assume that Congress chose the particular language that it did in light of this Court's treatment of that same language in *D'Oench, Duhme*. It makes no sense to assume, as did the court of appeals, that Congress did not intend the language to be treated like the language in *D'Oench, Duhme* because of the existence of an alternate basis for disposition that the Court could have adopted but did not even discuss.



In our view, the court of appeals' decision rested on an implicit dissatisfaction with this Court's construction of the charter provisions at issue in *Osborn* and *D'Oench, Duhme*. Whatever the merits of that view as an abstract proposition, the fact remains that Congress formulated the Red Cross's charter after those decisions had given the words Congress chose a settled meaning. Congress was entitled to assume that it could establish jurisdiction by using language that this Court repeatedly had found sufficient for the purpose. See, e.g., *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (noting "the well-settled presumption that Congress understands the state of existing law when it legislates"). To reach a different result at this point based on possible dissatisfaction with the reading adopted by Chief Justice Marshall and his colleagues in *Osborn* would intrude unduly on Congress' reasonably settled expectations regarding the manner in which this Court would interpret that language. Compare *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part and concurring in the judgment) ("Regardless of what one may think of [one of this Court's 19th Century decisions], it has been assumed to be the law for nearly a century. \* \* \* Even if we were now to find that assumption to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed.").

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E., RESPONDENTS

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit

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BRIEF FOR THE PETITIONER

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### **QUESTION PRESENTED**

Whether 36 U.S.C. § 2, which provides that the American National Red Cross has the right "to sue and be sued in courts of law and equity, State or Federal," vests federal courts with original jurisdiction over actions to which the Red Cross is a party, so that the Red Cross may remove to federal court under 28 U.S.C. § 1441(a) and (b) a tort action brought in state court.





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# **In the Supreme Court of the United States**

OCTOBER TERM, 1991

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No. 91-594

AMERICAN NATIONAL RED CROSS, PETITIONER

*v.*

S.G. AND A.E., RESPONDENTS

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit**

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**BRIEF FOR THE PETITIONER**

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 938 F.2d 1494. The opinions of the district court (Pet. App. 18a-30a) are unreported.

## **JURISDICTION**

The court of appeals entered its judgment on July 24, 1991. The Red Cross filed its petition for a writ of certiorari on October 1, 1991, and the Court granted the petition on November 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTORY PROVISION INVOLVED

Section 2 of the American National Red Cross charter, 36 U.S.C. § 2, provides, in relevant part, that the American National Red Cross "shall have \* \* \* the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States."

### STATEMENT

Respondents, a husband and wife, sued the Red Cross in March 1990 in the Superior Court of Merrimack County, New Hampshire. They alleged that the wife became infected with human immunodeficiency virus (HIV), which causes AIDS, as a result of a transfusion of blood collected by the Red Cross in August 1984 (before any test to screen donated blood for HIV was available). The Red Cross removed the case to federal court under 28 U.S.C. § 1441, contending that the court had jurisdiction under 36 U.S.C. § 2. The district court agreed that federal jurisdiction existed and denied respondents' motion to remand the case to state court. The district court ruled that the language in the Red Cross charter providing that the Red Cross has "the power to sue and be sued in courts of law and equity, State or Federal," creates original jurisdiction in the federal courts. Pet. App. 24a. The First Circuit reversed, holding that the charter confers only the capacity to sue, not the right to federal jurisdiction. *Id.* at 12a.

#### A. The Red Cross and its Charter

This case involves the construction of the Red Cross charter, as amended in 1947, in light of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738

(1824), and its progeny. Construction of the 1947 charter amendments is aided by an understanding of the background of the Red Cross.

Since 1864, several Geneva Conventions have provided for neutral persons from various nations to administer relief for the sick and wounded in times of war. See 36 U.S.C. § 1 note; 36 U.S.C. § 3; *Department of Employment v. United States*, 385 U.S. 355, 359 & n.8 (1966). In 1881, what is now known as the American National Red Cross was formed to serve that function. See 36 U.S.C. § 1 note. The Red Cross has been reincorporated several times and was granted its first congressional charter in 1905. In granting the charter, Congress stated that it "believed that the importance of the work demands a repeal of the present charter and a reincorporation of the society under Government supervision." *Ibid.*

The 1905 charter formally assigned to the Red Cross various peacetime duties, including disaster relief and prevention, in addition to its military-related duties. See 36 U.S.C. § 3; *Department of Employment*, 385 U.S. at 359. The Red Cross's blood services program, directly at issue in the increasing litigation against the Red Cross, plays a central role in discharging those important duties. As Solicitor General Thurgood Marshall advised this Court in *Department of Employment*:

By carrying on an extensive blood collection program, maintaining blood banks and training people in such skills as nursing, first aid and life saving, the Red Cross is prepared to offer the nation effective help in case of disaster or war.

Brief for the Appellees 21-22, *Department of Employment v. United States*, 385 U.S. 355 (1966) (O.T.

1966, No. 78) [hereinafter *Department of Employment Brief*].

The 1905 charter empowered the Red Cross "to sue and be sued in courts of law and equity within the jurisdiction of the United States." Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600. Whatever the meaning of that clause, the 1905 charter unquestionably created original federal jurisdiction because, as of 1905, *all* federally chartered corporations were automatically within the jurisdiction of the federal courts. The then-prevailing law of original federal jurisdiction was stated in the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), which held that the fact of federal incorporation *by itself* conferred federal jurisdiction over all cases involving federally chartered corporations.

This grant of federal jurisdiction over all Red Cross cases became less clear in 1925, when Congress overruled *Pacific Railroad* by passing what is now 28 U.S.C. § 1349, which may by its terms be limited to stock corporations.<sup>1</sup> It is unclear whether Congress intended Section 1349 to apply to the Red Cross, a non-stock corporation. What is clear is that, notwithstanding Section 1349, Congress may confer federal jurisdiction over a corporation by specific language in its corporate charter. In *Osborn v. Bank of the United States*, *supra*, this Court held that a sue-and-be-sued clause making specific reference to the federal courts conferred federal jurisdiction. The

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<sup>1</sup> The statute provides that "[t]he district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."

sue-and-be-sued clause in *Osborn* gave the Bank the right "to sue and be sued \* \* \* in all state courts having competent jurisdiction, and in any circuit court of the United States." 22 U.S. (9 Wheat.) at 817.

After the enactment of Section 1349, the Red Cross considered revisions to its charter and by-laws. The Chairman of the Red Cross appointed a distinguished committee, known as the Harriman Committee, to recommend such changes. See Pet. App. 12a. The Harriman Committee Report is formally entitled *Report of the Advisory Committee on Organization* (June 11, 1946). See C.A. App. 94-138; App. *infra*, 1a-4a. Its recommendations were the acknowledged basis of Congress's 1947 amendments to the Red Cross charter. S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947). The Committee in 1946 recommended that the Red Cross charter be amended to "make it clear that the Red Cross can sue and be sued in the Federal Courts" because "in view of the limited nature of the *jurisdiction* of the Federal Courts it seems desirable that this *right* be clearly stated in the charter." Harriman Committee Report 35, 36, App., *infra*, 3a, 4a (emphasis added). Congress responded to that suggestion by adding the words "State or Federal" to the sue-and-be-sued clause, so that it now entitles the Red Cross "to sue and be sued in courts of law and equity, *State or Federal*, within the jurisdiction of the United States." 36 U.S.C. § 2 (emphasis added). Neither the Senate nor the House report comments on the purpose of the amendment beyond endorsing the Harriman Committee Report, but Senator Walter George remarked at a hearing: "I think the purpose of the bill is very clear, and



that is to give the jurisdiction in State courts and Federal courts, and I think we had better leave it there.” *American National Red Cross: Hearings on S. 591 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 10 (1947).

The charter revisions that were undertaken in 1946-1947 changed far more than the sue-and-be-sued clause, and they served broad purposes identified in the Harriman Committee Report. One such purpose was “recognition of the national stature of the Red Cross and of the national interests in aid of which the Red Cross now functions.” Harriman Committee Report 15, App., *infra*, 1a. The Report also acknowledged that the Red Cross is an “agency of the Government of the United States” for various purposes. *Id.* at 20, App., *infra*, 2a-3a. This Court likewise has noted that, “time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross’ status virtually as an arm of the Government”; thus, despite some “respects in which the Red Cross differs from the usual government agency,” it is a “tax-immune instrumentalit[y] of the United States.” *Department of Employment*, 385 U.S. at 359-360; see also *United States v. City of Spokane*, 918 F.2d 84, 87 (9th Cir. 1990) (“there can be no doubt” that “the Red Cross is an instrumentality of the United States”), cert. denied, 111 S. Ct. 2888 (1991).

Several important national and international aspects of the Red Cross are among those that have led this Court and others to conclude that the Red Cross is an instrumentality of the national government. For example, the President of the United States appoints the Chairman and seven other members of the Red Cross’s Board of Governors. 36 U.S.C. § 5(a).



The Department of Defense audits the Red Cross annually. 36 U.S.C. § 6. The Red Cross in practice as well as by law works hand in hand with the United States Government. See generally *Department of Employment Brief, supra*. It is *the* entity that performs the United States' obligations under specified existing treaties and has even been designated in advance "to perform all the duties devolved upon a national society" by any future "treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion." 36 U.S.C. § 3; see *Department of Employment Brief* 16-17. John W. Davis, then Solicitor General and Counselor to the Red Cross, described the Red Cross in 1918 as "a quasi-governmental organization, \* \* \* designated by Presidential order for the fulfillment of certain treaty obligations into which the United States has entered." *Quoted in Department of Employment Brief* 24-25. In recognition of the Red Cross's international importance, the charter amendments at issue here were placed within the jurisdiction of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. See S. Rep. No. 38, 80th Cong., 1st Sess. (1947); H.R. Rep. No. 337, 80th Cong., 1st Sess (1947).

The question presented here is whether this important instrumentality of the United States, whose charter originally provided for removal to federal courts and now makes specific reference to those courts, may remove a nondiversity action from state court.

#### **B. The Proceedings Below**

The Red Cross removed this case from New Hampshire state court to the federal district court pursuant

to 28 U.S.C. § 1441(a) and (b). The district court denied respondents' motion to remand, holding that the sue-and-be-sued clause in the Red Cross charter creates original federal jurisdiction and thus entitles the Red Cross to remove to federal court actions to which it is a party. Pet. App. 23a-24a. The court relied on *Osborn v. Bank of the United States*, *supra*, in which this Court held that a sue-and-be-sued clause that referred expressly to federal courts did confer federal jurisdiction.

On interlocutory appeal, the First Circuit reversed. The court determined that *Osborn* did not control the analysis because a broad reading of *Osborn* could not be sustained in light of "subsequent case law and legislation." Pet. App. 7a. Apparently concluding that the Red Cross charter was "ineptly drafted" because it did not contain a clearer statement conferring federal jurisdiction (*id.* at 16a), the court held that the charter creates only the capacity to sue and be sued, not federal jurisdiction.

The court of appeals found this case closer to *Bankers Trust Co. v. Texas & Pacific Railway*, 241 U.S. 295 (1916), than to *Osborn*. Pet. App. 7a-9a. In *Bankers Trust*, this Court held that a sue-and-be-sued clause that referred to "all courts of law and equity within the United States" was not a grant of jurisdiction to federal courts, but merely conferred the capacity to sue and be sued where jurisdiction was otherwise established. Although there is no specific reference to the federal courts at all in that clause (as there was in *Osborn* and is in the Red Cross charter), the First Circuit read *Bankers Trust* to turn on the failure of the clause to "mention a particular federal court (i.e., the circuit court)." *Id.* at

8a (emphasis added); see also *id.* at 10a. The First Circuit also inferred from *Bankers Trust*, and 28 U.S.C. § 1349, a general rule “that a congressional grant of such jurisdiction should not be implied from ambiguous language.” Pet. App. 9a.

The court of appeals further distinguished *Osborn* on the ground that the charter in that case gave the Bank power to “sue and be sued \* \* \* in all state courts *having competent jurisdiction*, and in any circuit court of the United States.” 22 U.S. (9 Wheat.) at 817, *quoted in* Pet. App. 9a (emphasis added by the First Circuit). The court reasoned that the presence of the phrase “of competent jurisdiction” in the portion of the *Osborn* charter dealing with state courts, combined with its absence from the portion of the charter dealing with federal circuit courts, justified reading the statute as one conferring jurisdiction on the federal courts. By contrast, the Red Cross charter refers to state and federal courts in a single clause without the phrase “having competent jurisdiction.” The First Circuit deemed the “parallel” treatment of state and federal courts in the Red Cross charter sufficient to distinguish it from the one at issue in *Osborn*. *Id.* at 10a.

Finally, the court of appeals dismissed the legislative history of the Red Cross charter on the ground that it showed no “clear intent on the part of Congress to confer original [federal] jurisdiction.” Pet. App. 12a. The court acknowledged the reference to “jurisdiction” in the Harriman Committee Report but refused to accord it weight because the word was not used in the formal recommendation, the statutory amendment, or the Senate Report. *Id.* at 12a-14a. Relying on other contemporaneous statutes, the court

also noted that Congress could have made its intention to confer jurisdiction clearer. *Id.* at 14a-15a.

Based on its reading of the Red Cross charter, the court of appeals ordered that the case be remanded to state court if diversity jurisdiction did not provide an independent basis for removal. Pet. App. 2a-3a. The district court, which had previously indicated its intention to join nondiverse parties whom respondents had sued separately in state court (Pet. App. 21a-23a, 28a), reaffirmed its position and remanded the case to state court (see Br. in Opp. App. 13a-15a).<sup>2</sup>

### INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has ruled consistently that an express reference to the federal courts in a federal corporation's sue-and-be-sued clause creates federal jurisdiction over actions involving that corporation. The seminal and still controlling case on point is *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). In that case, the Bank's charter allowed it to "sue and be sued \* \* \* in all State Courts having competent jurisdiction, and in any circuit court of the United States." 22 U.S. (9 Wheat.) at 817 (emphasis added). The Court determined that this charter language constituted an express grant of federal jurisdiction over cases involving the Bank:

These words seem to the Court to admit of but one interpretation; they cannot be made plainer

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<sup>2</sup> For the reasons stated in the Red Cross's reply brief at the petition stage (at 2-4), it is clear that the remand to state court neither divests this Court of jurisdiction nor renders the case moot. See, e.g., *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-467 (1947) (remand to state court cannot "defeat this Court's jurisdiction"); 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3740, at 598 (1985); 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.169[2.-1], at 697 (1990).

by explanation. They give, expressly, the right to "sue and be sued," "in every circuit court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose.

22 U.S. (9 Wheat.) at 817. This Court concluded that the Bank's sue-and-be-sued clause "confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it" (*id.* at 818).

In reaching that decision, the Court distinguished an earlier case involving the Bank's predecessor, *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), on the ground that the charter in *Deveaux* referred only to "courts of record" (*id.* at 85) and did not specify the federal courts. Thus, *Osborn* established the principle that reference to the federal courts in a sue-and-be-sued clause creates federal jurisdiction.

In the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), this Court went well beyond *Osborn* by holding that the mere fact of federal incorporation creates federal jurisdiction over cases involving those corporations. Congress reacted by withdrawing federal jurisdiction based solely on a railroad's federal incorporation (Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803), and in 1925 limited the ability of a corporation to invoke federal jurisdiction purely on the ground that it was federally chartered (see 28 U.S.C. § 1349). Those enactments in no way undermine *Osborn's* applicability to the present case, however, because *Osborn's* statutory holding is grounded strictly in the charter language that referred to the federal courts, not in the fact of federal incorporation.



Subsequent case law confirms the validity of distinguishing between jurisdiction based on charter language and jurisdiction based on the fact of federal incorporation. In *Bankers Trust Co. v. Texas & Pacific Railway*, 241 U.S. 295 (1916), this Court again construed charter language that empowered a railroad to sue and be sued “in all courts of law and equity *within the United States*” but did not refer expressly to the federal courts. *Id.* at 302 (emphasis added). The Court found that charter language to suffer from “the same generality” as the language in *Deveaux*, and held that it did not create federal jurisdiction. *Id.* at 304-305. Under *Osborn*, *Deveaux*, and *Bankers Trust*, it is clear that express reference to the federal courts in the sue-and-be-sued clause is necessary to create federal jurisdiction. It is equally clear, however, that reference to a *specific* federal court is *not* required for federal jurisdiction. Indeed, on the only occasion when this Court *has* confronted a sue-and-be-sued clause that referred specifically to the federal courts but not to any particular federal court, it found the clause to be a grant of jurisdiction. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 455 (1942).

We submit that the foregoing case law is enough to decide this case. Under *Osborn*, a reference to the federal courts in a sue-and-be-sued clause creates federal jurisdiction. The First Circuit tried to limit *Osborn* to its facts, but there is no reason to do so. *Osborn* did not turn on (or even mention) the distinctions that the First Circuit thought important: the distinction between reference to a particular federal court and reference to the federal *courts* generally, and the distinction between “parallel” and unparallel treatment of state and federal courts. Nor



can either distinction be sustained after *D'Oench*. In addition, there is no reason why a court *should* limit *Osborn* to its facts. Doing so would frustrate the intent of a Congress that was entitled to rely on *Osborn* as written, promote complexity in the law of jurisdiction, and deprive the Red Cross of a needed federal forum.

If the Court believes it necessary to look beyond the case law to the legislative history of the Red Cross charter, it will find additional support for reading the charter as a grant of jurisdiction. The Harriman Committee expressly referred to the charter amendment as one pertaining to the jurisdiction of the federal courts and the "right" of the Red Cross to sue in those courts, and jurisdiction was referred to in the hearings on the amendments. There is no proper basis to discount those references. The First Circuit also erred by demanding a clearer statement from Congress before it would find jurisdiction. One could just as easily demand a clearer statement from Congress before finding that the Red Cross charter merely confers the *capacity* to sue in federal court, especially in light of the complete implausibility of reading the 1947 amendment as nothing but a reaffirmation of a capacity for federal suit that indisputably existed under the 1905 charter. The First Circuit's negative inferences are not a reliable way to ascertain the meaning of the Red Cross charter.

## ARGUMENT

### THE RED CROSS CHARTER CREATES ORIGINAL FEDERAL JURISDICTION OVER ALL CASES IN- VOLVING THE RED CROSS

The Red Cross charter provides that the American National Red Cross "shall have \* \* \* the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." 36 U.S.C. § 2. Under *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), such a sue-and-be-sued clause must be read to confer jurisdiction on the federal courts in all suits by or against the Red Cross. The legislative history of 36 U.S.C. § 2, although unnecessary to a decision in favor of jurisdiction, confirms that reading.

#### I. *OSBORN v. BANK OF THE UNITED STATES* IS DISPOSITIVE

The rule that emerges from this Court's past decisions, and should reemerge from this case, is a simple one: If Congress refers explicitly to federal courts when granting an entity the power to sue and be sued, the sue-and-be-sued clause confers jurisdiction on those courts. We read *Osborn* to stand for that exact proposition. Because the Red Cross charter specifically refers to the federal courts in its sue-and-be-sued clause, *Osborn* is dispositive, and the Court need not even consider arguments based on the circumstances surrounding the amendment of the Red Cross charter. See *Kaiser v. Memorial Blood Center*, 938 F.2d 90, 93 (8th Cir. 1991).

The First Circuit read *Osborn* quite differently. That court construed *Osborn* as a case narrowly limited to finding jurisdiction based on a charter worded

*exactly* like the charter of the second Bank of the United States; the court thought the significance of the case “limited to its focus upon the ‘sue and be sued’ language of the *particular* charter” (Pet. App. 7a (emphasis added)). As we will now show, it is wrong to read *Osborn* that way. First, the reasoning that the Court employed in *Osborn* is utterly inconsistent with the very distinctions that the First Circuit thought important, as is evident from careful examination of the *Osborn* litigation itself, and subsequent litigation including *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). Second, any effort to “reinterpret” *Osborn*, so as to confine it to its facts, would surely cause more harm than good.

**A. The Grounds On Which The First Circuit Attempted To Distinguish *Osborn* Are Inconsistent With This Court’s Reasoning In That Case And Subsequent Cases**

The First Circuit posed the correct question: “whether the grant of power to ‘sue and be sued’ expressly in a federal court, as well as in a state court, leads by itself to” the conclusion that an entity is subject to original federal jurisdiction, rather than merely having the capacity to sue in federal court. Pet. App. 7a. The court answered that question by refusing to ascribe “talismanic significance” to “a simple reference to federal courts in a congressional charter.” *Ibid.* Rather, before the First Circuit would accept a charter as being within the *Osborn* rule, it would apparently demand two things: “mention [of] a *particular* federal court” (Pet. App. 8a (emphasis added)); see also *id.* at 10a (“reference to the jurisdiction of specific courts”)); and a reference to state courts of “competent jurisdiction” as opposed

to a “parallel” treatment of state and federal courts in the sue-and-be-sued clause (*id.* at 9a-10a).

Each of those features happened to be present in the charter of the second Bank of the United States. Yet they played no role whatever in the arguments of counsel or the decision of the Court in *Osborn*. To reinterpret *Osborn* as *requiring* those features before a court will find jurisdiction would distort the Court’s reasoning beyond recognition. Moreover, this Court has held that a sue-and-be-sued clause that lacks *either* of those features is a basis for federal jurisdiction. *D’Oench, Duhme & Co. v. FDIC*, *supra*. Although the First Circuit purported to find justification for its distinctions in other decisions of this Court, this Court has *never* rejected an argument for federal jurisdiction when the sue-and-be-sued clause referred to the federal courts; its decisions rejecting jurisdictional arguments do not rest on the factors that the First Circuit cited.

**1. *The Distinction Between A Charter That Mentions A Specific Federal Court And One That Refers Generally To The Federal Courts Is Insignificant***

In *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), and in *Bankers Trust Co. v. Texas & Pacific Railway*, 241 U.S. 295 (1916), this Court construed sue-and-be-sued clauses as conferring merely the capacity to sue in federal courts, rejecting the argument that they conferred jurisdiction on the federal courts. The clause in *Deveaux* gave the Bank the power to sue and be sued “in Courts of record, or in any other place whatsoever.” The clause in *Bankers Trust* gave the railroad the power to sue and be sued “in all courts of law and

equity within the United States.” These decisions from 183 and 76 years ago are the only cases in which the Court has ever held that a sue-and-be-sued clause does not create federal jurisdiction. Cf. Pet. App. 11a n.5 (ascribing significance to the fact that only once “in the 166 years since *Osborn*” has this Court held that a sue-and-be-sued clause *does* create federal jurisdiction).

By contrast, in *Osborn* the Court construed a sue-and-be-sued clause as conferring jurisdiction on the federal courts. The clause in *Osborn* gave the Bank the power to sue and be sued “in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.”

The striking difference between the clauses held to be nonjurisdictional and the one held to be jurisdictional is that the former do not refer to the federal courts by name at all, whereas the latter does. Nevertheless, *solely* on the authority of *Deveaux* and *Bankers Trust*, the First Circuit held that the relevant distinction is between the mention of “a particular federal court (i.e., the circuit court)” in *Osborn* and the failure to mention any *specific* court in the other cases. Pet. App. 8a. There is not a word in any of the three opinions by this Court ascribing any significance to that distinction; the First Circuit simply invented it as a way to make the Red Cross charter look more like *Deveaux* and *Bankers Trust* than like *Osborn*.

In fact, *Osborn* and the later decision in *D'Oench* are flatly inconsistent with the First Circuit's revisionist interpretation of those cases. The words that Chief Justice Marshall chose to distinguish *Osborn* from *Deveaux* are important, for they demonstrate



that it was the reference to the federal courts *generally*, not the reference to a *specific* federal court, that influenced the Court's decision:

Whether this decision [*Deveaux*] be right or wrong, it amounts only to a declaration, that a general capacity in the bank to sue, *without mentioning the courts of the Union*, may not give a right to sue in those courts. To infer from this, that words expressly conferring a right to sue in *those courts*, do not give the right, is surely a conclusion which the premises do not warrant.

22 U.S. (9 Wheat.) at 818 (emphasis added). Likewise, the Chief Justice's opinion for the Court, in concluding that the jurisdiction so conferred was consistent with Article III of the Constitution, paraphrased the Bank's charter as one "enabling the Bank to sue in the Courts of the United States." *Id.* at 828. Had the Court thought it important that the circuit courts were mentioned specifically, rather than the federal courts generally, it surely would not have employed that phrase. Furthermore, the counsel who argued *Osborn* on behalf of the Bank never attempted to distinguish *Deveaux* on the ground that the clause in that case mentioned courts generally rather than a specific federal court. Rather, their argument was that the charter in *Deveaux* "did not confer the privilege of suing in *the Courts of the Union*, *they* not being specifically mentioned. But no doubt was intimated, that *those Courts* would have had jurisdiction, if *they* had been mentioned in the act." *Id.* at 805 (emphasis added).

There is a much more natural explanation than the one the First Circuit posited for the difference between the specific mention of the circuit courts in



the Bank's charter and the general reference to the federal courts in the Red Cross charter. At the time of *Osborn*, the federal court system was "a curious one \* \* \* [with] two tiers of trial courts," the district and circuit courts. P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 31 (3d ed. 1988); see generally *id.* at 30-33, 34-36 (discussing structure of the federal judiciary from 1789 through mid-1800s). In order to confer trial jurisdiction through a sue-and-be-sued clause, Congress naturally specified which of the two possible trial courts would have jurisdiction. In 1911, however, there ceased to be "two sets of federal trial courts" when Congress "finally abolished the old circuit courts." *Id.* at 38-39 & nn.47 & 49. In seeking to confer jurisdiction on federal trial courts through a sue-and-be-sued clause, therefore, Congress no longer has any need to specify one or another such court; it is obvious that the district courts are intended. That difference between the federal judicial structure as of 1824 and the modern structure explains the difference between the *Osborn* charter, on the one hand, and modern charters such as the 1933 FDIC charter construed in *D'Oench* (discussed below) and the 1947 Red Cross charter, on the other. It does not make sense to read into that difference an intention to confer jurisdiction when a clause refers to the circuit courts but not when it refers generally to the federal courts. *Osborn* rests instead on the distinction between a clause that refers to the federal courts and one that does not.

*Bankers Trust* adds nothing to the analysis. The clause at issue in that case was indistinguishable from the clause at issue in *Deveaux* (it did not refer

to the federal courts), and the Court so held. 241 U.S. at 304. Nevertheless, the First Circuit read into *Bankers Trust*, 241 U.S. at 303, a general principle that “a congressional grant of [federal] jurisdiction should not be implied from ambiguous language.” Pet. App. 9a. There is, however, no such principle, at least not when the source of the jurisdictional grant is a sue-and-be-sued clause resembling the clause in *Osborn*.

What the Court said at the cited page in *Bankers Trust* was that “it seems reasonable to believe that Congress would have expressed” a purpose to grant federal jurisdiction over all cases involving the railroad “in altogether different words” from the actual language of the charter in that case, which made no mention of the federal courts. One cannot generalize from that statement to the proposition that, even when Congress *has* referred explicitly to the federal courts, it will be assumed not to have conferred federal jurisdiction if it could have spoken more clearly. Nor do legislative developments since 1824 have anything to do with the proper analysis here, as the court of appeals suggested (Pet. App. 7a, 8a). This Court in *Bankers Trust* did not, as the First Circuit claimed, “interpret[] \* \* \* the railroad’s charter in light of” a 1915 amendment to the Judiciary Act (Pet. App. 8a) but rather held the charter to be indistinguishable from *Deveaux*. See 241 U.S. at 303-305. The 1915 statute (and the similar legislation now codified at 28 U.S.C. § 1349) are relevant only insofar as they show that federally chartered entities seeking to invoke federal jurisdiction must rely—precisely as the Red Cross does here—on their sue-and-be-sued clauses, not on the mere fact of federal incorporation.

*D'Oench* proves conclusively that the First Circuit erred. It represents the only occasion when this Court *has* confronted a sue-and-be-sued clause that referred specifically to the federal courts but not to any particular federal court. The Court found the clause to be a grant of jurisdiction. It wrote:

The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue and be sued "in any court of law or equity, State or Federal."

315 U.S. at 455. In an accompanying footnote, the Court noted that the quoted Act "further provides" that actions in which the FDIC is a party shall be deemed to arise under federal law, yet the Court made no comment on the significance of that fact. *Id.* at 455 n.2. The fact that the Court regarded as having jurisdictional importance was the one quoted in the text, *i.e.*, that the statute—exactly like the Red Cross charter—authorized suit "in any court of law or equity, State or Federal."

Justice Jackson, concurring, stated even more explicitly that the "arising under" language found in the majority's footnote had a substantive purpose (*i.e.*, directing the courts to fashion a federal common law) and that jurisdiction itself was conferred by the statute's reference to the federal courts:

This case is not entertained by the federal courts because of diversity of citizenship. It is here because a federal agency brings the action, and the law of its being provides, with exceptions not important here, that: "All suits of a civil nature at common law or in equity to which the Cor-

poration shall be a party shall be deemed to arise under the laws of the United States: . . .” *That this provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision that the Corporation may sue and be sued “in any court of law or equity, State or Federal.”*

315 U.S. at 467-468 (emphasis added and footnote omitted).

The universally shared assumption in the 1940s (when the Red Cross charter was amended) that a sue-and-be-sued clause referring to the federal courts confers jurisdiction is evident from the Solicitor General’s position before this Court. When identifying the basis for federal jurisdiction in the case, the Solicitor General cited only the sue-and-be-sued clause. Brief for the Respondent in Opposition 8, *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (O.T. 1941, No. 206); Brief for the Respondent 17-18, 59, *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (O.T. 1941, No. 206).<sup>3</sup> In light of those affirmative statements by the Solicitor General, the First Circuit is wrong to have claimed that “[n]either the parties nor the Court directly raised the validity of subject

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<sup>3</sup> The Solicitor General’s brief in opposition stated that “[t]he jurisdiction of the federal court in this case arose \* \* \* from the statute of Congress authorizing respondent to sue and be sued in state and federal courts.” The Solicitor General’s merits brief stated, somewhat less clearly, that “the federal jurisdiction is based upon an act of Congress (Federal Reserve Act, Sec. 12B(j), Appendix, *infra*, pp. 58-59).” Any ambiguity about whether the Solicitor General was relying on the sue-and-be-sued clause or the “arising under” clause is removed, however, by reference to page 59 of the appendix, where the “arising under” clause of subsection (j) was omitted.

matter jurisdiction under the F.D.I.C. charter." Pet. App. 11a. The basis of jurisdiction, although not the ultimate issue in *D'Oench*, was addressed by the parties and important to the Court's analysis.

The First Circuit conceded that this Court in *D'Oench* at least "not[ed] \* \* \* incidentally that jurisdiction was premised on the 'sue and be sued' clause," but it did not accept the proposition that the FDIC's sue-and-be-sued clause was adequate to confer jurisdiction. Rather, the court embarked on its own self-guided tour of federal jurisdiction in FDIC cases. Pet. App. 11a & n.5. The court insisted that the "arise under" clause mentioned in a footnote as something the Act "further provides" was the part of the statute that conferred jurisdiction, not the sue-and-be-sued clause cited in the text of the majority opinion, the concurrence, and the government's briefs. But it is this Court's reasoning that must control, and this Court has held that a sue-and-be-sued clause that refers generally to the federal courts confers federal jurisdiction.

**2. *The Reference In The Osborn Charter To State Courts Of "Competent Jurisdiction" Is Irrelevant To The Holding That The Reference To The Federal Courts Is A Grant Of Jurisdiction***

The First Circuit purported, however erroneously, to find support in *Deveaux* and *Bankers Trust* for its distinction between charters that mention a specific federal court and charters that refer to the federal courts generally. Yet it relied solely on *Osborn* in finding it significant that the Red Cross charter treats state and federal courts in "parallel fashion." Pet. App. 9a-10a. *Osborn*, as the First



Circuit read it, turned on the peculiar indication in the Bank's charter that "Congress was concerned with the jurisdiction of the courts in which the bank could 'sue and be sued' " (*id.* at 9a), namely its reference to "state courts *having competent jurisdiction*" (*ibid.*). Thus, it is particularly important to review the *Osborn* litigation to see whether the absence of parallel treatment there--the reference to "state courts *having competent jurisdiction*" but to "any circuit court of the United States"—played any role in the Court's reasoning. Such a review shows that it did not.

The First Circuit's argument, had anyone thought of it in 1824, would have perhaps been an ingenious way to try to distinguish the decision in *Deveaux*. In that case, a unanimous Court had held in an opinion by Chief Justice Marshall that the first Bank of the United States had no power to sue in federal court even though its charter allowed it to "sue and be sued \* \* \* in courts of record, or any other place whatsoever." 9 U.S. (5 Cranch) at 85. As Justice Johnson eventually pointed out in his *Osborn* dissent, the Court could have construed those expansive words as a grant of jurisdiction, because, "if the Circuit Courts were *Courts of record*, the right of suit given was as full as any other words could have made it." 22 U.S. (9 Wheat.) at 880. But the Court chose not to construe those words expansively in *Deveaux*. Counsel for the second Bank of the United States thus had much reason to fear that the Marshall Court would construe its charter the same way, and their fear must have been exacerbated when the Court set *Osborn* for reargument on the jurisdictional question on March 10 and 11, 1824, in tandem with *Bank of the United States v. Planters' Bank of Georgia*, 22



U.S. (9 Wheat.) 904 (1824). See generally 3-4 G. Edward White, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* 524, 526 (1988).

The argument presented by Henry Clay, Daniel Webster, and Thomas Sergeant on behalf of the Bank is reported in the United States Reports. 22 U.S. (9 Wheat.) at 804-811. Despite their strong incentive to present every colorable argument they could muster, those historic figures did not present the argument that the First Circuit now regards as critical to *Osborn's* holding. Rather, they were content to argue that, in response to *Deveaux*, "Congress adopted the phraseology which is contained in the present charter, giving the Bank power 'to sue and be sued in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.' Power in the party 'to sue,' confers jurisdiction on the Court." 22 U.S. (9 Wheat.) at 805 (emphasis in original).

The Court itself cited the affirmative language conferring the right to sue in federal courts, not the reference to "jurisdiction" in the portion of the clause dealing with state courts, as the basis of its holding. "To infer from this, that words expressly conferring a right to sue in those Courts, do not give the right, is surely a conclusion which the premises do not warrant. The act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it." 22 U.S. (9 Wheat.) at 818. Only one Justice mentioned the reference to state courts in his analysis, and he reached precisely the opposite conclusion from the First Circuit. Justice Johnson maintained that the treatment of state and federal courts in the Bank's charter *was* parallel and

that, because Congress could not have been "ignorant of the fact" that it lacked any power to confer jurisdiction on state courts, it must not have conferred jurisdiction on the federal courts either. *Id.* at 881-882 (Johnson, J., dissenting).

The thought that Congress demonstrated its desire to confer jurisdiction on federal courts by its lack of "parallel" treatment of state and federal courts played no role in the *Osborn* litigation. It is the brain-child of the First Circuit alone and is not a historically defensible way to limit *Osborn*.

Furthermore, *D'Oench* again disproves the First Circuit's theory of how *Osborn* and sue-and-be-sued clauses are to be read. The clause in that case permitted suit "in any court of law or equity, State or Federal," and thus treated state and federal courts in precisely parallel fashion. The First Circuit tried to escape from *D'Oench* on the ground that the sue-and-be-sued clause in that case was not the basis of federal jurisdiction, but, as we have explained above, that is not true. *D'Oench* thus reaffirms what *Osborn* demonstrates: a reference to the federal courts in a sue-and-be-sued clause is a grant of federal jurisdiction; nothing more is necessary. Accordingly, the Red Cross charter should be construed as a grant of jurisdiction.

#### **B. There Is No Good Reason To Narrow *Osborn***

As we have shown, the only reading of *Osborn* that is faithful to its reasoning, and to its place within the larger body of precedent including *Deveaux*, *Bankers Trust*, and *D'Oench*, is contrary to the First Circuit's analysis. Even if we suppose for the sake of argument that a court is entitled to confine those prece-

dents to their facts in order to reach a desirable result, the First Circuit's approach has nothing to recommend it. Rather, it would systematically misapprehend the intent of a legislature that for 168 years has had no reason to doubt that it can confer jurisdiction on the federal courts by referring to them specifically in the sue-and-be-sued clause of a federally chartered entity; it would introduce complexity and uncertainty into a jurisdictional field that should be marked by simple, easy-to-apply rules; and it would deprive the Red Cross of a federal forum even though litigation against the Red Cross may raise complex issues of federal immunity best decided by the federal courts.

1. The First Circuit's approach, which requires a presumption *against* jurisdiction that can be overcome only by unambiguous language (Pet. App. 8a-9a), is likely to frustrate rather than further the will of Congress, both in this case and generally. Congress has enacted charters and sue-and-be-sued clauses with every reason to expect that it was conferring jurisdiction by referring to the federal courts. It must have been clear to Congress ever since 1824 that adding the words "State or Federal" to a federal charter creates federal jurisdiction, because that has been the accepted interpretation of such a reference since *Osborn*. One must, of course, presume that Congress intended those words to have the meaning that this Court had given them in similar legislation. *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 325 (1990); *Cannon v. University of Chicago*, 441 U.S. 677, 695-698 (1979); see also *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988). Congress is entitled to assume that the same interpretive standard will be applied to virtually identical jurisdictional provisions. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 808 (1988)

("cases interpreting identical language in other jurisdictional provisions \* \* \* have quite naturally applied the same test").

The principle that Congress could create federal jurisdiction over federally chartered corporations by identifying the federal courts in the sue-and-be-sued clause was particularly well established at the time Congress amended the Red Cross charter. Indeed, just a few years before Congress amended the charter, Justice Cardozo stated for a unanimous Court that "there was no thought to disturb" "the doctrine of the charter cases." *Gully v. First National Bank*, 299 U.S. 109, 114 (1936). Even closer to the time of the Red Cross charter amendments, this Court ruled in *D'Oench* that there is original federal jurisdiction over FDIC cases based on that agency's sue-and-be-sued clause, which is identical to the Red Cross's clause in all pertinent respects (including those the First Circuit thought important). See pp. 21-23, *supra*. However rigorous or unrigorous the analysis in that case, it clearly reflects the operating assumption of knowledgeable observers—including both this Court and the Solicitor General—that a reference to the federal courts in a sue-and-be-sued clause was a clear, proper, and adequate way to confer jurisdiction on the federal courts. And, only two years before Congress amended the Red Cross charter, the Eighth Circuit observed that federal jurisdiction existed over the Federal Savings and Loan Insurance Corporation as a result of that entity's power "to sue and be sued, complain and defend, in any court of law or equity, State or Federal." *FSLIC v. Kearney Trust Co.*, 151 F.2d 720, 724-725 (8th Cir. 1945) (quoting *D'Oench*).



Congress thus was entitled to rely on the proposition that a sue-and-be-sued clause that refers to the federal courts confers jurisdiction. Even if the Court *now* thought that a better rule would be to require a "clearer" statement of jurisdiction, it would be improper to undermine that reliance interest by denying effect to words that had been definitively construed as of the time Congress acted. In the closely related area of *stare decisis*, this Court just last month wrote that "[s]*tare decisis* has added force when the legislature \* \* \* ha[s] acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton v. South Carolina Public Railways Commission*, 60 U.S.L.W. 4056, 4057 (U.S. Dec. 16, 1991); see also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 35 (1989) (opinion of Scalia, J.) (even a constitutional issue should not be revisited if Congress has passed statutes based on the assumption that this Court's prior resolution of that issue was the law); *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part and concurring in the judgment) (same).

Congress has never had any reason to imagine that courts would attach significance to the creative distinctions (never mentioned in a judicial decision before litigation over the scope of the Red Cross charter began) that the First Circuit came up with in this case—between a reference to a particular federal court and a reference to the federal courts generally, or between "parallel" and unparallel treatments of state and federal courts. Nor should Congress have to worry that the "currents of lawyerly invention" (*K mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 187

(1988)) will spawn jurisdictional litigation over every slight variation of the wording in sue-and-be-sued clauses from entity to entity. The First Circuit's novel plain-statement requirement (Pet. App. 8a-9a) also cannot be viewed as a means of accurately ascertaining congressional intent. Such rules are imposed, at the expense of the occasional mistake in interpretation, when some special reason of policy requires that Congress speak with the utmost clarity. A plain-statement rule is not compelled by any overriding policy concern and has no basis here. See *Astoria Federal Savings & Loan Association v. Solimino*, 111 S. Ct. 2166, 2170 (1991) ("[r]ules of plain statement and strict construction prevail only to the protection of weighty and constant values").

In short, the approach most likely to ascertain congressional intent accurately, both in this case and in general, is also the approach most faithful to *Osborn's* reasoning. Narrowing *Osborn* by reinterpretation would not serve congressional intent.

2. Simplicity in jurisdictional rules is a virtue not to be taken lightly. See, e.g., *K mart*, 485 U.S. at 187 (interpretation of jurisdictional rules should not "drift on the currents of lawyerly invention"); *id.* at 196 (Scalia, J., dissenting) (same); *Bowen v. Massachusetts*, 487 U.S. at 930 (Scalia, J., dissenting). The rule we advocate not only is compelled by *Osborn*, but also is simple and easy to apply: a sue-and-be-sued clause that refers to the federal courts expressly is a grant of federal jurisdiction.

The First Circuit's approach, by contrast, is complicated and calls for a detailed comparison of any charter to the *Osborn* charter to see whether linguistics



tic variations raise some ambiguity that can then be construed to negate the inference that the clause is a grant of jurisdiction. The First Circuit's approach also seems to call for a review of the legislative history in every case (see Pet. App. 12a-16a).

These are not trivial concerns, because other entities besides the Red Cross will be affected by this Court's choice among the proposed modes of analysis. Litigation by federal agencies over the jurisdictional character of their charters, while fairly rare, has occurred, and has generally been resolved by an affirmative finding of federal jurisdiction. See *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. at 455; *id.* at 468 n.5 (Jackson, J., concurring) (citing 12 U.S.C. § 1432, applicable to Federal Home Loan Banks, as a jurisdiction-conferring statute indistinguishable from that of the FDIC); *Portsmouth Redevelopment & Housing Authority v. Pierce*, 706 F.2d 471, 475 (4th Cir.) (12 U.S.C. § 1702, which provides that the Secretary of Housing and Urban Development may "sue and be sued in any court of competent jurisdiction, State or Federal," "confer[s] subject matter jurisdiction in the federal district court"), cert. denied, 464 U.S. 960 (1983); *FSLIC v. Kearney Trust Co.*, 151 F.2d at 724-725 (federal jurisdiction existed over the Federal Savings and Loan Insurance Corporation as a result of that entity's power "to sue and be sued, complain and defend, in any court of law or equity, State or Federal"). The Solicitor General also has advised this Court: "Plainly, Section 1702, by authorizing suit 'in any court of competent jurisdiction, State or Federal,' provides a basis for district court jurisdiction \* \* \*." Brief for the Respondents in Opposition 9, *Portsmouth Redevelopment & Housing Authority v. Pierce*, 464 U.S. 960 (1983) (No. 83-90). Nu-

merous agencies that have not so far litigated the jurisdictional character of their charters could potentially be subject to such litigation, with its attendant uncertainties, if the First Circuit's complex position prevails.<sup>4</sup>

3. Finally, there is no good reason to suppose that Congress intended to require the Red Cross (or other entities whose charter interpretation will be affected by the decision in this case) to litigate in state court. To the contrary, there are good reasons to afford the Red Cross a federal forum in all cases.

Congress determined in 1905 that the importance of the Red Cross's work warranted reincorporation under federal supervision. See p. 3, *supra*. Congress

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<sup>4</sup> 12 U.S.C. § 1432(a) (Federal Home Loan Banks); 12 U.S.C. § 1441(c) (8) (FHLBB's Financing Corporation); 12 U.S.C. § 1441b(d) (8) (Resolution Funding Corporation); 12 U.S.C. § 1702 (Secretary of HUD); 12 U.S.C. § 1723a(a) (Government National Mortgage Association and Federal National Mortgage Association); 15 U.S.C. § 78ccc(b) (1) (Securities Investor Protection Corporation); 42 U.S.C. § 8105(b) (4) (Neighborhood Reinvestment Corporation). Some of these statutes grant the power to sue and be sued "in any court of competent jurisdiction, State or Federal." *E.g.*, 12 U.S.C. § 1723a(a). The "of competent jurisdiction" language *weakens* the case for construing the statute as a grant of original federal jurisdiction, since a statute containing that language might be read to presuppose that jurisdiction is determined by some body of law other than the sue-and-be-sued clause itself. See *Califano v. Sanders*, 430 U.S. 99, 106 n.6 (1977). Nevertheless, at least one statute containing that language has been construed as a grant of federal jurisdiction (see *Portsmouth Redevelopment & Housing Authority v. Pierce*, 706 F.2d 471, 475 (4th Cir.), cert. denied, 464 U.S. 960 (1983)). If that construction is proper, it follows *a fortiori* that the Red Cross charter, which lacks such language, confers jurisdiction.

deemed federal supervision necessary because of the “*national* stature of the Red Cross” and the “*national* interests” served by the Red Cross. Harriman Committee Report 15, App., *infra*, 1a (emphasis added). “[T]he federal government still maintains ample supervision of and control over the Red Cross’ activities through the ‘specific duties’ imposed upon it by Congress, the existing agreements between Red Cross and various executive departments, the annual audit of the Red Cross by the Department of Defense, and the facts that Red Cross personnel are subject to Defense Department regulation and, at least in time of war, to the direction of the armed forces in battle areas.” *Department of Employment* Brief 30-31. The Red Cross is important as well in the field of foreign affairs (see pp. 6-7, *supra*), clearly a federal rather than state concern. It is consistent with these interests for Congress to have provided jurisdiction for the Red Cross in the *national* courts. Even the First Circuit conceded that “[a]s a matter of practical sense, it is easy to imagine that Congress would have conferred federal subject matter jurisdiction in cases by and against the Red Cross” and said that it was “tempt[ed] \* \* \* to reach out for a reading of the statute which \* \* \* may seem more in tune with the times.” Pet. App. 15a-16a.<sup>5</sup>

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<sup>5</sup> The First Circuit’s musings (Pet. App. 16a) about how it is easy to imagine that Congress *would have* wanted to confer federal jurisdiction over Red Cross cases, but impossible to find that it did so, are reminiscent of the comments of Justice Johnson’s dissenting opinion in *Osborn*, 22 U.S. (9 Wheat.) at 873-874 (“I believe, that the good sense of a people, who know that they govern themselves, \* \* \* would readily concede to the Bank, thus circumstanced, some, if not all the rights here contended for. But I cannot persuade myself, that they have been conceded in the extent which this

Yet the First Circuit's decision that the Red Cross charter does not create federal jurisdiction will impede uniformity in resolving the federal questions that will arise repeatedly in litigation as a result of the Red Cross's status as a federal instrumentality. Trial courts will need to decide, for example, whether the Red Cross shares the federal government's immunity from punitive damages and from jury trial demands. See *Okoro v. Children's National Medical Center*, Civ. No. 5325-87, slip op. 7 (D.C. Super. Ct. May 30, 1989) ("A Federal instrumentality retains its immunity from punitive damages unless Congress explicitly authorizes liability for such damages. The statute creating the Red Cross did not provide such an explicit waiver.") (citation omitted); *Lehman v. Nakshian*, 453 U.S. 156, 168 (1981) (federal government exempt from jury trial demands); *In re Young*, 869 F.2d 158 (2d Cir. 1989) (United States Postal Service, as a federal instrumentality with a sue-and-be-sued clause, has immunity from jury trial demands); *Jones-Hailey v. TVA*, 660 F. Supp. 551 (E.D. Tenn. 1987) (same as to TVA). Whatever the correct resolution of those questions may be, they are *federal* questions that should receive *federal* determination. Cf. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 111 S. Ct. 1700, 1709 (1991) (complex issues of federal immunity may "need[] the protection of a federal forum"). The potential for variant state court determinations of these issues strengthens the case for interpreting the Red Cross charter to create federal jurisdiction because the contrary result would under-

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decision affirms."). It is the philosophy of the *Osborn* dissent and not of the majority that animates the First Circuit's opinion.

mine the national purposes for which the Red Cross was formed.

The only possible counterweight to these arguments is that some litigation against the Red Cross will principally involve questions of state law, and it could be argued that those questions should be entrusted to state courts.<sup>6</sup> But this Court rejected that very argument in its constitutional discussion in *Osborn*, 22 U.S. (9 Wheat.) at 819-820. See also *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1867), quoted in *Mesa v. California*, 489 U.S. 121, 128-129 (1989). Indeed, removal disputes arise *only* when the case is brought under state law; suits expressly based on federal law are always removable under 28 U.S.C. § 1441(b). Nevertheless, Congress has determined that certain entities should have the right always to litigate in federal rather than state court. Although the need to protect certain federally chartered entities from local prejudices manifested in state court has surely abated since the days of *Osborn*,<sup>7</sup> just as surely

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<sup>6</sup> Another possible policy argument for requiring the Red Cross to litigate in state court is that only in state court can the Red Cross be sued along with other nondiverse co-defendants, such as a local doctor who treated the plaintiff. Whatever force that policy argument might have had in the past, however, it is no longer relevant following the 1990 statutory amendments that provide for the exercise of pendent party jurisdiction to the fullest extent permitted by Article III of the Constitution. See 28 U.S.C. § 1367(a). It would appear that, in many cases commenced after the effective date of Section 1367, if the Red Cross is a defendant in federal court, other defendants could be joined as pendent parties without the need for an independent basis of jurisdiction.

<sup>7</sup> It is no secret that a desire to protect the Bank of the United States from state hostility was part of the impetus for the *Osborn* decision. See 3-4 G. Edward White, *supra*, at 969; *Osborn*, 22 U.S. (9 Wheat.) at 871-874 (Johnson, J., dissenting).



there remain imbedded in the nation's statutory law a variety of provisions designed to secure "the protection of a federal forum." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). There is no reason to deny the Red Cross that protection. See *Reisner v. Regents of the University of California*, No. CV-91-1252-JMI (JRx), slip op. 4-6 (C.D. Cal. Aug. 22, 1991) (observing, in addressing the same jurisdictional issue presented here, that the national purposes for which the Red Cross was chartered "may be thwarted if local or regional needs or prejudices are allowed to bring undue pressure on the Red Cross[,] \* \* \* [which] could easily be brought to bear in trial situations in a local forum").

Ultimately, of course, the foregoing concerns are relevant only insofar as they bear on the proper outcome as a matter of *statutory construction*, not the judicial perception in 1992 of the Red Cross's "need" *vel non* to remove cases to federal court. But this discussion demonstrates that there are powerful reasons to conclude that Congress would not have wanted to subject the Red Cross to state-court litigation without its consent.<sup>8</sup> It would be unwise, as well as unfaithful to history, to read *Osborn* as the First Circuit read it. This Court should not go down that path, but should accept and reaffirm *Osborn* on the terms on which it was decided.

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<sup>8</sup> Of course, the Red Cross can always consent to litigation in state court simply by forgoing exercise of its right to remove the case. It is in fact the Red Cross's practice to remove only those cases that it perceives as implicating some significant interest of the national organization, not cases of purely local concern. AIDS cases, because they implicate the policies and practices of the Red Cross's nationwide blood program, are of far more than local concern.



**II. TO THE EXTENT THIS CASE CALLS FOR A PARTICULARIZED INQUIRY INTO THE INTENT OF CONGRESS IN AMENDING THE RED CROSS CHARTER, THAT INQUIRY CONFIRMS THAT THE SUE-AND-BE-SUED CLAUSE IS JURISDICTIONAL**

After distinguishing *Osborn* and *D'Oench*—on grounds that we have shown to be erroneous—the First Circuit proceeded to analyze what it called “the legislative history of the amendment.” Pet. App. 12a-16a. The court then delved into the Harriman Committee Report, the reports of congressional committees, roughly contemporaneous amendments of *other* federal charters, and even the litigation position of the Red Cross in a 1951 district court case in its search for clues as to whether Congress really did or did not have jurisdiction in mind when it amended the Red Cross charter.

Far and away the best indication of Congress’s intent in amending the Red Cross charter in 1947 is the words that Congress chose and their established meaning at the time. For the reasons we have already given, that analysis conclusively shows that the Red Cross charter confers jurisdiction on federal courts. Nevertheless, the legislative history of the Red Cross charter, properly construed, strongly supports that conclusion. Moreover, the other sources the First Circuit cited do not undermine it.

The actual legislative history of the charter amendments—as opposed to the extraneous sources the First Circuit considered under the heading of “legislative history”—certainly supports the Red Cross’s position. Nowhere does the Harriman Committee Report, any congressional debate, or either congressional committee report suggest that the amendment to the sue-and-

be-sued clause was intended to address the Red Cross's *capacity* to sue. Rather, those who commented on the issue in those materials—the Harriman Committee and Senator George—*expressly* stated the purpose of the amendment to be jurisdictional. See pp. 5-6, *supra*. Any perceived need to find legislative history to support the *Osborn*-based interpretation of the language of the statute therefore should have been satisfied. See also *Anonymous Blood Recipient v. Sinai Hospital*, 692 F. Supp. 730, 733 (E.D. Mich. 1988) (“there is no ambiguity whatever in the language of the [Harriman Committee] recommendation”).

The First Circuit, however, rejected these explicit references to “jurisdiction” on the curious ground that they were not repeated elsewhere. Pet. App. 12a-14a. The court found it significant, for example, that “the Senate Report makes no mention of the jurisdictional point whatsoever.” *Id.* at 14a. But the Senate Report is less than two pages long (less than *one* full page of text) and states merely that the legislation incorporates the uncontroversial recommendations of the Harriman Committee Report. S. Rep. No. 38, 80th Cong., 1st Sess. (1947). Attaching importance to what the document does *not* say is grasping at straws. See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) (“In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.”). Likewise, the First Circuit thought it meaningful that “the language of the [Harriman Committee] recommendation itself [Recommendation No. 22; App., *infra*, 3a] makes no such reference to jurisdiction” as is made in the explanatory paragraph accompanying the formal rec-

ommendation. Pet. App. 13a. But it makes no sense to disregard an explanatory paragraph just because it does more than repeat that which it is intended to explain. Finally, the First Circuit said that “the language of the amendment does not purport to expand the jurisdiction of federal courts to include all cases involving the Red Cross.” Pet. App. 14a. But that statement simply assumes the court’s conclusion. In fact, as we have shown, the language of the amendment, read in light of *Osborn*, plainly *does* give the federal courts jurisdiction over all cases involving the Red Cross. Indeed, the First Circuit’s use of the word “expand” is a catachresis. Amending the charter in 1947 to provide for federal jurisdiction was not *expanding* such jurisdiction but merely *clarifying* that the federal jurisdiction undeniably conferred by the 1905 charter (see p. 4, *supra*) still would exist.

The remainder of the First Circuit’s “legislative history” analysis proceeded by negative inference from extraneous sources. Because the Red Cross failed to argue that the charter confers federal jurisdiction in a single district court case in 1951, but rather argued for federal diversity jurisdiction, the court of appeals concluded that the charter cannot have “created a new basis for federal jurisdiction.” Pet. App. 15a. Because Congress can use and sometimes has used-clearer language to create jurisdiction, the court of appeals concluded that it must not have meant to confer jurisdiction here. *Id.* at 14a-15a. Those arguments are not convincing.

The court of appeals placed weight on the fact that, in *Patterson v. American Nat. Red Cross*, 101 F. Supp. 655 (S.D. Fla. 1951), the Red Cross is re-

ported to have argued that the case was properly in federal court under diversity jurisdiction (a basis of jurisdiction that need not be invoked if the charter automatically confers federal jurisdiction over all Red Cross cases). The reported opinion of the district court is brief, and we have been unable to locate the papers that the parties filed with the court. It is possible that the Red Cross *did* argue for automatic jurisdiction under the sue-and-be-sued clause, but the district court either found it unnecessary to address the argument (because it ruled in the Red Cross's favor on what it may have considered simpler grounds) or simply misunderstood the argument. The district court did write, immediately after quoting the sue-and-be-sued clause: "Certainly Congress contemplated suits by or against the defendant in the Federal Courts when enacting the amendment." *Id.* at 656.

Even if the Red Cross did refrain from making the argument, there is no basis to discern why it did so. Its forbearance may have resulted from tactical considerations (*e.g.*, it may have been important to the Red Cross for some reason to establish judicially that it is a citizen of the District of Columbia) or from simple ignorance on the part of local counsel (who, in that era, were likely unpaid volunteers and may not even have been in touch with the national office of the Red Cross as opposed to its local Chapter), rather than—as the court of appeals inferred—from an informed judgment that the charter was not intended to confer jurisdiction. Accordingly, the fact that the Red Cross may not have argued its current position in *Patterson* says nothing meaningful about the correctness of that position.

The First Circuit's negative inference from Congress's failure to use clearer language fails for two reasons. First, in light of the long history of interpreting a reference to the federal courts in a sue-and-be-sued clause as a grant of jurisdiction, Congress had every reason to think that it *was* speaking clearly when it amended the Red Cross charter. Second, whether or not Congress could have chosen clearer language to express its wish to confer jurisdiction, Congress *certainly* could have spoken much more clearly if it had had the intent that the court of appeals ascribed to it, *i.e.*, merely to confer capacity on the Red Cross to sue. The case against reading the charter as the First Circuit read it is far more compelling than the case against reading it as a grant of jurisdiction.

The court of appeals concluded that the 1947 amendment to the Red Cross charter had the effect of "conferring only the power to sue." Pet. App. 12a. But construing the amendment merely to endow the Red Cross with the capacity to sue makes the words "State or Federal" completely superfluous. It was unnecessary to add the words "State or Federal" to the 1905 charter to achieve that end, because the charter already empowered the Red Cross "to sue and be sued in courts of law and equity within the jurisdiction of the United States." Federal courts surely had been courts of law within the jurisdiction of the United States between 1905 and 1947; thus the First Circuit's interpretation of the 1947 amendment renders the amendment a nullity. That is error. See *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) ("[i]t is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inopera-



tive' "); cf. *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2638 (1991).

Moreover, a comparison of the Red Cross charter to its most contemporaneous counterpart, which the First Circuit did not consider, shows that Congress would have chosen different words to convey only the *capacity* to sue and be sued in state and federal courts. If Congress had intended to do that, it would have given the Red Cross merely the power "to sue and be sued, to complain and to defend in any court of competent jurisdiction," without explicit reference to the federal courts. And that is precisely what Congress did in reincorporating the Export-Import Bank of the United States on June 9, 1947, just a month after it amended the Red Cross charter. Act of June 9, 1947, ch. 101, § 1, 61 Stat. 130 (current version at 12 U.S.C. § 635(a)(1)). But Congress was concerned with more than the capacity for suit; it wanted to confer on the Red Cross the *right* to be in federal court. Even the First Circuit grudgingly admitted that the relevant legislative history (the Harriman Committee Report) "refers to the jurisdiction of federal courts and the 'right' of the Red Cross in this regard." Pet. App. 13a. That is why Congress inserted into the Red Cross charter language that had been held to create original federal jurisdiction.

The court of appeals compounded its error by misquoting in a significant way the statute it regarded as the best evidence that Congress in the 1947 amendment did not intend to create original federal jurisdiction. In August 1947, Congress passed a statute conferring on federal district courts jurisdiction over cases in which the Federal Crop Insurance Corporation sues or is sued. The court of appeals asserted



that "Congress so amended the F.C.I.C. charter despite the presence of the language 'sue and be sued in any court, state or federal' in the corporation's original charter." Pet. App. 14a.<sup>9</sup> The actual language in the original FCIC charter, however, was quite different: "The Corporation \* \* \* may sue and be sued in its corporate name in any court of *competent jurisdiction*, State or Federal." Act of Feb. 16, 1928, ch. 30, § 506, 52 Stat. 73 (emphasis added). The "of competent jurisdiction" language—which is absent from the Red Cross charter—introduces a potential ambiguity that Congress may have wished to eliminate, since the earlier version might be read to presuppose that jurisdiction is determined by some body of law other than the sue-and-be-sued clause itself. See note 4, *supra*. Because no such ambiguity has ever appeared in the Red Cross charter, the 1947 amendment of the FCIC charter cannot form the basis for any inference about the meaning of the 1947 amendment of the Red Cross charter. The court of appeals erred by drawing such an inference.

The inference that the court of appeals drew is wrong for the additional reason that it inverts the proper time sequence that should guide the interpretation of the Red Cross charter. Courts must look to "the state of the law *at the time the legislation was enacted*," and not to subsequently enacted laws, to

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<sup>9</sup> The court of appeals relied further on language in the charter of the Commodity Credit Corporation, also enacted *after* the amendment to the Red Cross charter, that conferred *exclusive* original jurisdiction on the federal courts. Pet. App. 14a-15a (citing Act of June 29, 1948, ch. 704, § 4, 62 Stat. 1070). The court failed to appreciate that Congress naturally would use different language to create exclusive rather than concurrent jurisdiction.

interpret the meaning of statutory language. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982) (emphasis added). Congress's subsequent ideas about how to make a jurisdictional reference in a sue-and-be-sued clause even clearer than it is in the Red Cross charter cannot reach back to introduce ambiguity into that charter, which, as of May 8, 1947, was as clear a conferral of jurisdiction in a sue-and-be-sued clause as Congress had ever enacted.

Thus, even if a venture into "legislative history" is appropriate in this case, a fair construction of the legislative history, which discusses federal jurisdiction and the "right" of the Red Cross to litigate in federal court, strongly confirms that 36 U.S.C. § 2 creates original federal jurisdiction. The First Circuit was able to reach a contrary conclusion only by drawing negative inferences on one side without considering the equally plausible inferences on the other side, by misquoting one of the statutes on which it heavily relied, and in general by construing every possible ambiguity in the legislative history against a finding of jurisdiction. See, *e.g.*, Pet. App. 12a ("The legislative history of the amendment is relatively sparse and evinces no *clear* intent on the part of Congress to confer original jurisdiction.") (emphasis added); *id.* at 13a ("The Harriman Committee report itself does not *clearly* indicate that the proposed amendment was aimed at conferring federal subject matter jurisdiction \* \* \*") (emphasis added). By demanding *clear* evidence before it would find jurisdiction, and by disregarding the evidence that contradicts the alternative reading of the statute as one that merely confers the capacity to sue, the court largely predetermined the outcome of its analysis.

A more open-minded approach, however, yields a very different conclusion, one consistent with the intent of Congress and the prior rulings of this Court.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

**Excerpts from the *Report of the Advisory  
Committee on Organization* (June 11, 1946)**

[15]

## V. OBJECTIVES OF THE COMMITTEE.

In order to frame the recommendations for a modern structure for the Red Cross, the Committee, in line with the task outlined by the Chairman, adopted the three following objectives:

1) That the Red Cross will truly represent the Nation it serves;

2) That the governing organization will truly represent, and be responsive to, the entire membership of the Red Cross;

3) That the organizational structure of the Red Cross will lend itself to the most effective possible handling of the programs and activities of the Red Cross.

Each of these objectives presents a separate problem.

The first objective requires a recognition of the national stature of the Red Cross and of the national interests in aid of which the Red Cross now functions, both in time of peace and in time of war. The foregoing analysis of Red Cross programs indicates that while the organization has advanced far beyond the initial limited concept of a Red Cross society as an agency for the relief of sick and wounded military personnel, it still performs important functions under international treaties in time of war. It also in World War II greatly extended the relief to the families of



military personnel and contemplates extensive service to veterans during the post-war period. It has also assumed certain commitments in the international relief field. In conducting this type of activity the Red Cross functions as an agency of the Federal Government. It would therefore seem that to meet the first objective the organization should afford proper representation of the national interest at large.

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[20] COMPOSITION OF THE BOARD OF  
GOVERNORS—PRESIDENTIAL APPOINTMENTS.

*Recommendation No. 2. The Charter should provide that of the Board of Governors of 50, eight members shall be selected by the President of the United States, of whom one shall be designated by him as President of the Red Cross. The remaining seven shall be selected from departments and agencies of the Federal Government. Of these seven, at least one and not more than three shall be selected from the armed forces, and the remainder shall be officials whose positions and interests are such as to qualify them to contribute toward the accomplishment of Red Cross programs and objectives.\**

It is the belief of the Committee that, as laid down in the objectives which it has set to guide its recommendations, the organization should be truly representative of the membership of the Red Cross and of the various national interests and elements which it serves.

The American Red Cross is, and will continue to be, it is assumed, the agency of the Government of the United States for the performance of certain of

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\* Approved by the Central Committee without change.

the treaty obligations assumed by the United States under the Geneva Convention. The American Red Cross, it is assumed, will continue also to be the agency of the United States in the performance of certain services to the armed forces in time of war, and to the armed forces and veterans in time of peace. These responsibilities of the Red Cross, as well as responsibilities in the fields of disaster relief, health and welfare, require a close affiliation with the Federal Government which can be best brought about by the continuation in the [21] Charter of provisions requiring the naming of a portion of the governing body by the President of the United States.

It is thought that adequate representation of the interests of the Federal Government and its various agencies which directly touch the American Red Cross can be achieved through a membership of 7 on a governing body of 50.

At least one member of the armed forces should be required to be named by Charter provision, but selections from the other departments or agencies of the Government should be left within the discretion of the President of the United States, who would, in making his selections from time to time, take into account the areas of activity of the Red Cross most closely touching the Federal Government.

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#### [35] SUIT IN THE FEDERAL COURTS.

*Recommendation No. 22. The Charter should make it clear that the Red Cross can sue and be sued in the Federal Courts.\**

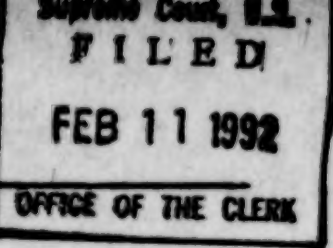
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\* Approved by the Central Committee without change.

The present Charter gives the Red Cross the power "to sue and be sued in courts of law and equity within the jurisdiction of the United States". The Red Cross has in several instances sued in the Federal Courts, and its powers in this respect have not been questioned. How- [36] ever, in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the Charter.



6  
No. 91-594



In The

**Supreme Court of the United States**

October Term, 1991

AMERICAN NATIONAL RED CROSS,

*Petitioner,*

vs.

S.G. AND A.E.,

*Respondents.*

*On Writ of Certiorari to the United States Court of Appeals for  
the First Circuit*

**BRIEF FOR RESPONDENTS**

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### **QUESTIONS PRESENTED**

1) Did Congress intend to confer original jurisdiction on the federal courts over common-law tort claims brought against the American National Red Cross when it enacted 36 U.S.C. § 2?

2) Do the federal courts have original jurisdiction over all cases involving the Red Cross, or is no federal question appears on the face of the well-pleaded complaint?



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*On Writ of Certiorari to the United States Court of Appeals for  
the First Circuit*

---

**BRIEF FOR RESPONDENTS**

---

**STATEMENT OF THE CASE**

In August 1984, respondent S.G. underwent a hysterectomy at Concord Hospital in Concord, New Hampshire. During this operation a blood transfusion was required. This blood was contaminated with human immunodeficiency virus ("HIV") and, as a result, S.G. now suffers from AIDS.



Upon discovering that she had this disease, S.G. and her husband, respondent A.E., commenced two actions in Merrimack County Superior Court (State Court), one against Kenneth L. McKinney (the physician who performed the operation) and the other against U.S. Surgical Corp. (the company that manufactured and sold the surgical stapler used by Dr. McKinney during the operation). These suits were commenced in April and August of 1988 in State Court and were later consolidated.

As discovery progressed, it became evident that a third party, the American National Red Cross, was responsible for furnishing the tainted blood. On March 2, 1990, the respondents commenced suit against Red Cross, again in Merrimack County Superior Court, alleging that Red Cross was negligent in failing to screen blood donors and that, as a result, S.G. became infected with HIV virus.

This third writ was accompanied by a motion to consolidate the action with the two pending suits against Dr. McKinney and U.S. Surgical. Before the Superior Court could rule on the motion to consolidate, Red Cross removed the action against it to the United States District Court for the District of New Hampshire. Red Cross alleged two grounds for removal: (1) that the Red Cross Charter, 36 U.S.C. § 2, confers on federal district courts original jurisdiction over actions involving the Red Cross, and (2) that the parties are citizens of different states and that federal jurisdiction is appropriate under 28 U.S.C. § 1332(a).

In an attempt to consolidate their three pending state law actions in one forum, respondents then filed a motion to remand the action against Red Cross to state court or, alternatively, to join the case against Red Cross with the previously filed actions against Dr. McKinney and U.S. Surgical Corp. and remand the consolidated action to state court pursuant to 28 U.S.C. § 1447(3).

Relying principally on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the district court denied the motion for remand, ruling that the Red Cross charter confers original jurisdiction over all cases to which the Red Cross is a party. The Court also ruled that joinder, followed by remand pursuant to 28 U.S.C. § 1447(e), would have been appropriate, but for the original federal jurisdiction established by the Red Cross charter.

Upon interlocutory review, the First Circuit Court of Appeals reversed, finding that the Red Cross Charter did not confer original federal jurisdiction over all cases involving the Red Cross. See *S.G. and A.E. v. American National Red Cross*, 938 F.2d. 1494 (1st Cir. 1991). On August 13, 1991 the First Circuit denied petitioner's motion for a stay of the mandate, and remanded the action to the district court. On September 24, 1991 the district court reaffirmed its prior order joining the two non-diverse defendants (Dr. McKinney and United States Surgical Corporation) and remanded the case to Merrimack County Superior Court.

The Court granted the Red Cross' petition for writ of certiorari on November 27, 1991.

### SUMMARY OF ARGUMENT

Removal to federal court of a state court action is permitted by 28 U.S.C. §§ 1441 (a) and (b) if the federal courts have original jurisdiction over the subject matter of the action. The burden of proof was on the Red Cross as the party seeking removal, and all doubts are resolved against removal. This action proceeds on state common law theories of negligence. Absent diversity of citizenship, then, the federal courts have jurisdiction over this action only if the Red Cross charter, 36 U.S.C. § 2, confers original federal jurisdiction over all actions involving the Red Cross.

Relying on *Osborn, supra*, the Red Cross asks this Court to read the language of 36 U.S.C. § 2 as a grant of original federal jurisdiction sufficient to support removal. The Red Cross' reliance on *Osborn* should be rejected for two reasons.

First, assuming *arguendo* that the *Osborn* doctrine can be applied to the Red Cross charter, there is a significant difference between the charter at issue in *Osborn* (which enabled the second Bank of the United States "to sue and be sued, in all state courts of competent jurisdiction, and in any Circuit Court of the United States") and the Red Cross' charter (which grants the Red Cross power "to sue and be sued in courts of law and equity, state or federal, within the jurisdiction of the United States"). The *Osborn* court found that the reference to a specific federal court in the bank charter established original federal jurisdiction in that court. No reference to a specific federal court is made in the Red Cross charter. Accordingly, even if the *Osborn* rule is applied to the Red Cross charter, it does not support the conclusion that original jurisdiction over the Red Cross is conferred on *any* federal court.

Second, since the decision in *Osborn*, Congress has substantially limited the original jurisdiction of the federal courts. In 1925, Congress enacted the predecessor to 28 U.S.C. § 1349, which precluded federal jurisdiction over corporations like the Red Cross that have federal charters unless they are owned or controlled by the United States. While § 1349 does not preclude an express conferral of federal jurisdiction over such a corporation, a congressional grant of jurisdiction should not be implied from ambiguous language.

Further, the legislative history of the 1947 Red Cross amendment (e.g., the Harriman Report, the Senate hearing and Senate and House Reports) strongly supports the respondents' position that Congress only intended to grant the Red Cross capacity to litigate in state and federal courts.

This Court interprets statutes to avoid deciding difficult constitutional questions when the text fairly admits of a less problematic construction. Should this Court construe the Red Cross charter to create original federal jurisdiction, it would then have to determine whether Article III of the Constitution permits Congress to confer original federal jurisdiction over all cases, including garden-variety state law tort claims, that happen to involve a federally chartered corporation. That difficult constitutional question need not be reached to decide this case.

Finally, it is axiomatic that removal of a state court action under 28 U.S.C. §§ 1441 (a) or (b) is only appropriate when a substantive federal question appears on the face of a well-pleaded complaint. This action is clearly founded on state common law negligence. Since the respondents' well-pleaded complaint does not implicate a federal cause of action and respondents' right to relief does not depend on a substantial question of federal law, the action was improvidently removed from state court.

## ARGUMENT

### I.

#### **THE RED CROSS CHARTER DOES NOT CONFER ORIGINAL FEDERAL JURISDICTION OVER CASES TO WHICH THE RED CROSS IS A PARTY.**

##### **A. The Burden of Proof and Policy of Strict Construction Under Removal Statutes.**

This suit against the Red Cross was originally commenced in state court by writ and a motion to consolidate with the two pending state actions. The Red Cross removed to federal court under 28 U.S.C. § 1441, the general removal statute. The respondents countered with a motion for joinder (with two pending

state actions) and remand. The burden of proof was on the Red Cross as the party seeking removal. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); 1A *Moore's Federal Practice* § 0.168 [4-1]; 14A Wright, Miller, Cooper, *Federal Practice and Procedure* § 3739. Under the trend of decisions both in this Court, and lower courts, the district court was under a duty to strictly construe the removal statutes, and resolve any doubts against removal. In *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941) this Court said:

Not only does the language of the Act of 1887 [a precursor to § 1441] evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the *strict construction* of such legislation.

(Emphasis added). See also 14A Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3721 p. 216, 217 ("removal statutes will be strictly construed" and "doubts should be resolved against removal"); *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988); *Jones v. General Tire and Rubber Co.*, 541 F.2d 660 (7th Cir. 1976). On the law and facts before this Court, the Red Cross has failed to sustain its burden of proof.

#### **B. Case Law and Statutes Relating to "Sue and Be Sued" Clauses.**

The Red Cross argues that removal is proper under § 1441 because its congressional charter directly gives federal courts original jurisdiction over any suit to which the Red Cross is a party. The charter includes the following language:

The name of this corporation shall be "The American National Red Cross" and by that name



it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States.

36 U.S.C. § 2. The Red Cross relies in particular on the "sue and be sued" clause as a conferral of federal jurisdiction.

Ordinarily, a provision in a corporate charter that grants the right to sue and be sued merely creates a capacity to litigate. See Fed. R. Civ. P. 17(b). In the case of a federal or government corporation, such a clause waives sovereign immunity. See *Loeffler v. Frank*, 486 U.S. 549, 554-557 (1988); *Federal Housing Admin. v. Burr*, 309 U.S. 242, 244-47 (1940).

This Court was first confronted with the construction of a federal charter in the case of *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809). In that case, the Bank contended that its congressionally enacted charter conferred original federal jurisdiction. In particular, the Bank relied on the provision in its charter enabling it "to sue and be sued, in courts of record, or any other place whatsoever." Chief Justice Marshall rejected the Bank's claim, ruling that:

This power, if not incident to a corporation, is conferred by every incorporating act and is not understood to enlarge the jurisdiction of any particular court, but to give capacity to the corporation to appear, as a corporation in any court which would, by law, have cognizance of the cause, if brought by individuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction and for all sums however small they may be.



The opinion of the Chief Justice in *Deveaux* is a clear recognition of the principle that a sue-and-be-sued clause, which only refers to courts in a general sense, will be construed to be a grant of capacity to sue, and not an enlargement of a court's jurisdiction.

This Court revisited the issue in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). In *Osborn* the federal charter of the Second Bank of the United States provided in part that the Bank should "be made capable in law to sue and be sued, plead and be impleaded, in all state courts having competent jurisdiction, and in any Circuit Court of the United States."

The *Osborn* Court ruled that the "sue and be sued" clause in the charter was intended to create in the Circuit Courts original jurisdiction over all suits by or against the Bank. He found the language too plain for argument:

These words seem to the court to admit of but one interpretation. They cannot be made plainer by explanation. They give expressly the right "to sue and be sued" "in every circuit court of the United States" and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose.<sup>1</sup>

---

1. Other legal scholars have been less certain about this language. Wright, Miller and Cooper in *Federal Practice and Procedure* § 3562 at p. 20, question this interpretation:

[T]his conclusion is debatable. A more natural interpretation might have been that the charter gave the bank capacity to be a party to a suit but did not in itself create jurisdiction. This is the construction now placed on such language in charters. *Bankers Trust Co. v. Texas & P. Ry Co.*, 241 U.S. 295, (1916).

Finally, under a broad construction of the "arising under" clause of Article III,, the *Osborn* Court ruled that this grant of jurisdiction to the second Bank was within the authority given to Congress under Article III, because the Bank's federal charter of incorporation not only created it, but gave it every faculty which it possessed.

At the time of *Osborn* (1824) there was no statutory "arising under" jurisdiction in the inferior federal courts. At that time, the district courts had original jurisdiction of admiralty cases, and the circuit courts had (1) original jurisdiction over major federal criminal offenses, (2) diversity jurisdiction over cases brought there originally or removed from state courts, and (3) appellate jurisdiction over the district courts. 1 *Moore's Federal Practice* § 0.2 [1].

Fifty years after the decision in *Osborn*, Congress conferred on the federal trial courts original jurisdiction over federal question cases (1875). The Judiciary Act of 1875 followed very closely the "arising under" language of Article III, but the courts were not obliged to give it the same broad construction as Article III. However, in 1885, in the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), this Court held that ordinary tort actions against railroads with federal charters were within the scope of the 1875 statute.<sup>2</sup> "Soon negligence suits against the Pacific Railroads and like litigation cluttered the federal courts, and aroused strong local animosities." Frankfurter, *A Study of the Federal Judicial System*, 39 Harv. L. Rev. 48. In 1915, Congress attempted to remedy this problem by enacting 38 Stat. 803 which provided in § 5 that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that

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2. Pacific has been termed "a triumph of mechanical logic over statesmanship" *Doe v. American Red Cross*, 727 F. Supp. 186 (E.D. Pa. 1989).

said railroad company was incorporated under an act of Congress.”

Shortly after the enactment of this statute the issue of federal jurisdiction under a federal charter resurfaced in this Court in *Banker's Trust Co. v. Texas and Pacific Railway Co.*, 241 U.S. 295, (1916). The *Texas and Pacific Railway* clause fell somewhere between *Osborn* and *Deveaux*, enabling it “to sue and be sued . . . in all courts of law and equity in the United States.” The charter made a broad general reference to all courts within the United States, but unlike *Osborn*, did not contain a specific reference to a particular federal court. The *Texas and Pacific Railway* Court ruled as follows on the sue and be sued clause:

While that act [the 1871 Act incorporating the railroad] does not literally follow either precedent [*Osborn* or *Deveaux*] its words have the *same generality and natural import* as did those of the earlier bank act, and this strengthens the conclusion that Congress intended thereby to give to the Texas and Pacific Railway Company only a general capacity to sue and be sued in courts of law and equity whose jurisdiction as otherwise defined was appropriate to the occasion, and *not to establish an exceptional or privileged jurisdiction*.

241 U.S. at 304-305 (emphasis added). The Court further observed:

Had there been a purpose to take suit by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy, and the venue, *it seems reasonable to believe that Congress would have expressed that purpose in altogether different words*.

241 U.S. at 303 (emphasis added).

The *Banker's Trust* Court's requirement of clearer language regarding the grant of federal jurisdiction rested at least in part on the 1915 statute, which denied federal jurisdiction to railroads on the sole ground that they were incorporated under an act of Congress. 241 U.S. at 306-308.

The ruling in *Banker's Trust* takes on added significance when we consider that in 1925 Congress enacted a similar statute, § 12 of the Judges Bill of 1925 [now 28 U.S.C. § 1349], which applied to all federally chartered corporations except those owned or controlled by the federal governments. That statute provided:

The District Courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.

The purpose of this statute was to stem the flood of litigation to which the federal courts were subjected as a result of the decision in the *Pacific Railroad Removal Cases*. See *Murphy v. Colonial Federal Savings and Loan Association*, 388 F.2d 609 (2d Cir. 1967).

When the Red Cross Charter is read in the light of this 1925 statute and the ruling in *Bankers Trust*, it is clear that federal jurisdiction will not be conferred by the use of general and unspecific language in "sue and be sued" clauses in a federal charter. As the First Circuit observed, "while § 1349 does not preclude an express grant of federal jurisdiction over such a corporation, *Banker's Trust* strongly suggests that a congressional grant of such jurisdiction should not be implied from ambiguous language." S.G. at 1498.

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No. 91-594

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In The

**Supreme Court of the United States**

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October Term, 1991

AMERICAN NATIONAL RED CROSS,

*Petitioner,*

vs.

S.G. AND A.E.,

*Respondents.*

*On Writ of Certiorari to the United States Court of Appeals for  
the First Circuit*

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**BRIEF FOR RESPONDENTS**

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**STATEMENT OF THE CASE**

In August 1984, respondent S.G. underwent a hysterectomy at Concord Hospital in Concord, New Hampshire. During this operation a blood transfusion was required. This blood was contaminated with human immunodeficiency virus ("HIV") and, as a result, S.G. now suffers from AIDS.

Upon discovering that she had this disease, S.G. and her husband, respondent A.E., commenced two actions in Merrimack County Superior Court (State Court), one against Kenneth L. McKinney (the physician who performed the operation) and the other against U.S. Surgical Corp. (the company that manufactured and sold the surgical stapler used by Dr. McKinney during the operation). These suits were commenced in April and August of 1988 in State Court and were later consolidated.

As discovery progressed, it became evident that a third party, the American National Red Cross, was responsible for furnishing the tainted blood. On March 2, 1990, the respondents commenced suit against Red Cross, again in Merrimack County Superior Court, alleging that Red Cross was negligent in failing to screen blood donors and that, as a result, S.G. became infected with HIV virus.

This third writ was accompanied by a motion to consolidate the action with the two pending suits against Dr. McKinney and U.S. Surgical. Before the Superior Court could rule on the motion to consolidate, Red Cross removed the action against it to the United States District Court for the District of New Hampshire. Red Cross alleged two grounds for removal: (1) that the Red Cross Charter, 36 U.S.C. § 2, confers on federal district courts original jurisdiction over actions involving the Red Cross, and (2) that the parties are citizens of different states and that federal jurisdiction is appropriate under 28 U.S.C. § 1332(a).

In an attempt to consolidate their three pending state law actions in one forum, respondents then filed a motion to remand the action against Red Cross to state court or, alternatively, to join the case against Red Cross with the previously filed actions against Dr. McKinney and U.S. Surgical Corp. and remand the consolidated action to state court pursuant to 28 U.S.C. § 1447(3).

Relying principally on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the district court denied the motion for remand, ruling that the Red Cross charter confers original jurisdiction over all cases to which the Red Cross is a party. The Court also ruled that joinder, followed by remand pursuant to 28 U.S.C. § 1447(e), would have been appropriate, but for the original federal jurisdiction established by the Red Cross charter.

Upon interlocutory review, the First Circuit Court of Appeals reversed, finding that the Red Cross Charter did not confer original federal jurisdiction over all cases involving the Red Cross. See *S.G. and A.E. v. American National Red Cross*, 938 F.2d. 1494 (1st Cir. 1991). On August 13, 1991 the First Circuit denied petitioner's motion for a stay of the mandate, and remanded the action to the district court. On September 24, 1991 the district court reaffirmed its prior order joining the two non-diverse defendants (Dr. McKinney and United States Surgical Corporation) and remanded the case to Merrimack County Superior Court.

The Court granted the Red Cross' petition for writ of certiorari on November 27, 1991.

### SUMMARY OF ARGUMENT

Removal To federal court of a state court action is permitted by 28 U.S.C. §§ 1441 (a) and (b) if the federal courts have original jurisdiction over the subject matter of the action. The burden of proof was on the Red Cross as the party seeking removal, and all doubts are resolved against removal. This action proceeds on state common law theories of negligence. Absent diversity of citizenship, then, the federal courts have jurisdiction over this action only if the Red Cross charter, 36 U.S.C. § 2, confers original federal jurisdiction over all actions involving the Red Cross.

Relying on *Osborn, supra*, the Red Cross asks this Court to read the language of 36 U.S.C. § 2 as a grant of original federal jurisdiction sufficient to support removal. The Red Cross' reliance on *Osborn* should be rejected for two reasons.

First, assuming *arguendo* that the *Osborn* doctrine can be applied to the Red Cross charter, there is a significant difference between the charter at issue in *Osborn* (which enabled the second Bank of the United States "to sue and be sued, in all state courts of competent jurisdiction, and in any Circuit Court of the United States") and the Red Cross' charter (which grants the Red Cross power "to sue and be sued in courts of law and equity, state or federal, within the jurisdiction of the United States"). The *Osborn* court found that the reference to a specific federal court in the bank charter established original federal jurisdiction in that court. No reference to a specific federal court is made in the Red Cross charter. Accordingly, even if the *Osborn* rule is applied to the Red Cross charter, it does not support the conclusion that original jurisdiction over the Red Cross is conferred on *any* federal court.

Second, since the decision in *Osborn*, Congress has substantially limited the original jurisdiction of the federal courts. In 1925, Congress enacted the predecessor to 28 U.S.C. § 1349, which precluded federal jurisdiction over corporations like the Red Cross that have federal charters unless they are owned or controlled by the United States. While § 1349 does not preclude an express conferral of federal jurisdiction over such a corporation, a congressional grant of jurisdiction should not be implied from ambiguous language.

Further, the legislative history of the 1947 Red Cross amendment (*e.g.*, the Harriman Report, the Senate hearing and Senate and House Reports) strongly supports the respondents' position that Congress only intended to grant the Red Cross capacity to litigate in state and federal courts.

This Court interprets statutes to avoid deciding difficult constitutional questions when the text fairly admits of a less problematic construction. Should this Court construe the Red Cross charter to create original federal jurisdiction, it would then have to determine whether Article III of the Constitution permits Congress to confer original federal jurisdiction over all cases, including garden-variety state law tort claims, that happen to involve a federally chartered corporation. That difficult constitutional question need not be reached to decide this case.

Finally, it is axiomatic that removal of a state court action under 28 U.S.C. §§ 1441 (a) or (b) is only appropriate when a substantive federal question appears on the face of a well-pleaded complaint. This action is clearly founded on state common law negligence. Since the respondents' well-pleaded complaint does not implicate a federal cause of action and respondents' right to relief does not depend on a substantial question of federal law, the action was improvidently removed from state court.

## **ARGUMENT**

### **I.**

#### **THE RED CROSS CHARTER DOES NOT CONFER ORIGINAL FEDERAL JURISDICTION OVER CASES TO WHICH THE RED CROSS IS A PARTY.**

##### **A. The Burden of Proof and Policy of Strict Construction Under Removal Statutes.**

This suit against the Red Cross was originally commenced in state court by writ and a motion to consolidate with the two pending state actions. The Red Cross removed to federal court under 28 U.S.C. § 1441, the general removal statute. The respondents countered with a motion for joinder (with two pending



state actions) and remand. The burden of proof was on the Red Cross as the party seeking removal. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921); 1A *Moore's Federal Practice* § 0.168 [4-1]; 14A Wright, Miller, Cooper, *Federal Practice and Procedure* § 3739. Under the trend of decisions both in this Court, and lower courts, the district court was under a duty to strictly construe the removal statutes, and resolve any doubts against removal. In *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941) this Court said:

Not only does the language of the Act of 1887 [a precursor to § 1441] evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the *strict construction* of such legislation.

(Emphasis added). See also 14A Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3721 p. 216, 217 ("removal statutes will be strictly construed" and "doubts should be resolved against removal"); *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988); *Jones v. General Tire and Rubber Co.*, 541 F.2d 660 (7th Cir. 1976). On the law and facts before this Court, the Red Cross has failed to sustain its burden of proof.

#### **B. Case Law and Statutes Relating to "Sue and Be Sued" Clauses.**

The Red Cross argues that removal is proper under § 1441 because its congressional charter directly gives federal courts original jurisdiction over any suit to which the Red Cross is a party. The charter includes the following language:

The name of this corporation shall be "The American National Red Cross" and by that name

it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States.

36 U.S.C. § 2. The Red Cross relies in particular on the "sue and be sued" clause as a conferral of federal jurisdiction.

Ordinarily, a provision in a corporate charter that grants the right to sue and be sued merely creates a capacity to litigate. See Fed. R. Civ. P. 17(b). In the case of a federal or government corporation, such a clause waives sovereign immunity. See *Loeffler v. Frank*, 486 U.S. 549, 554-557 (1988); *Federal Housing Admin. v. Burr*, 309 U.S. 242, 244-47 (1940).

This Court was first confronted with the construction of a federal charter in the case of *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809). In that case, the Bank contended that its congressionally enacted charter conferred original federal jurisdiction. In particular, the Bank relied on the provision in its charter enabling it "to sue and be sued, in courts of record, or any other place whatsoever." Chief Justice Marshall rejected the Bank's claim, ruling that:

This power, if not incident to a corporation, is conferred by every incorporating act and is not understood to enlarge the jurisdiction of any particular court, but to give capacity to the corporation to appear, as a corporation in any court which would, by law, have cognizance of the cause, if brought by individuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction and for all sums however small they may be.

The opinion of the Chief Justice in *Deveaux* is a clear recognition of the principle that a sue-and-be-sued clause, which only refers to courts in a general sense, will be construed to be a grant of capacity to sue, and not an enlargement of a court's jurisdiction.

This Court revisited the issue in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). In *Osborn* the federal charter of the Second Bank of the United States provided in part that the Bank should "be made capable in law to sue and be sued, plead and be impleaded, in all state courts having competent jurisdiction, and in any Circuit Court of the United States."

The *Osborn* Court ruled that the "sue and be sued" clause in the charter was intended to create in the Circuit Courts original jurisdiction over all suits by or against the Bank. He found the language too plain for argument:

These words seem to the court to admit of but one interpretation. They cannot be made plainer by explanation. They give expressly the right "to sue and be sued" "in every circuit court of the United States" and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose.<sup>1</sup>

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1. Other legal scholars have been less certain about this language. Wright, Miller and Cooper in *Federal Practice and Procedure* § 3562 at p. 20, question this interpretation:

[T]his conclusion is debatable. A more natural interpretation might have been that the charter gave the bank capacity to be a party to a suit but did not in itself create jurisdiction. This is the construction now placed on such language in charters. *Bankers Trust Co. v. Texas & P. Ry Co.*, 241 U.S. 295, (1916).

Finally, under a broad construction of the "arising under" clause of Article III., the *Osborn* Court ruled that this grant of jurisdiction to the second Bank was within the authority given to Congress under Article III, because the Bank's federal charter of incorporation not only created it, but gave it every faculty which it possessed.

At the time of *Osborn* (1824) there was no statutory "arising under" jurisdiction in the inferior federal courts. At that time, the district courts had original jurisdiction of admiralty cases, and the circuit courts had (1) original jurisdiction over major federal criminal offenses, (2) diversity jurisdiction over cases brought there originally or removed from state courts, and (3) appellate jurisdiction over the district courts. 1 *Moore's Federal Practice* § 0.2 [1].

Fifty years after the decision in *Osborn*, Congress conferred on the federal trial courts original jurisdiction over federal question cases (1875). The Judiciary Act of 1875 followed very closely the "arising under" language of Article III, but the courts were not obliged to give it the same broad construction as Article III. However, in 1885, in the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), this Court held that ordinary tort actions against railroads with federal charters were within the scope of the 1875 statute.<sup>2</sup> "Soon negligence suits against the Pacific Railroads and like litigation cluttered the federal courts, and aroused strong local animosities." Frankfurter, *A Study of the Federal Judicial System*, 39 Harv. L. Rev. 48. In 1915, Congress attempted to remedy this problem by enacting 38 Stat. 803 which provided in § 5 that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that

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2. Pacific has been termed "a triumph of mechanical logic over statesmanship" *Doe v. American Red Cross*, 727 F. Supp. 186 (E.D. Pa. 1989).

said railroad company was incorporated under an act of Congress.”

Shortly after the enactment of this statute the issue of federal jurisdiction under a federal charter resurfaced in this Court in *Banker's Trust Co. v. Texas and Pacific Railway Co.*, 241 U.S. 295, (1916). The *Texas and Pacific Railway* clause fell somewhere between *Osborn* and *Deveaux*, enabling it “to sue and be sued . . . in all courts of law and equity in the United States.” The charter made a broad general reference to all courts within the United States, but unlike *Osborn*, did not contain a specific reference to a particular federal court. The *Texas and Pacific Railway* Court ruled as follows on the sue and be sued clause:

While that act [the 1871 Act incorporating the railroad] does not literally follow either precedent [*Osborn* or *Deveaux*] its words have the *same generality and natural import* as did those of the earlier bank act, and this strengthens the conclusion that Congress intended thereby to give to the Texas and Pacific Railway Company only a general capacity to sue and be sued in courts of law and equity whose jurisdiction as otherwise defined was appropriate to the occasion, and *not to establish an exceptional or privileged jurisdiction*.

241 U.S. at 304-305 (emphasis added). The Court further observed:

Had there been a purpose to take suit by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy, and the venue, *it seems reasonable to believe that Congress would have expressed that purpose in altogether different words*.



241 U.S. at 303 (emphasis added).

The *Banker's Trust* Court's requirement of clearer language regarding the grant of federal jurisdiction rested at least in part on the 1915 statute, which denied federal jurisdiction to railroads on the sole ground that they were incorporated under an act of Congress. 241 U.S. at 306-308.

The ruling in *Banker's Trust* takes on added significance when we consider that in 1925 Congress enacted a similar statute, § 12 of the Judges Bill of 1925 [now 28 U.S.C. § 1349], which applied to all federally chartered corporations except those owned or controlled by the federal governments. That statute provided:

The District Courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.

The purpose of this statute was to stem the flood of litigation to which the federal courts were subjected as a result of the decision in the *Pacific Railroad Removal Cases*. See *Murphy v. Colonial Federal Savings and Loan Association*, 388 F.2d 609 (2d Cir. 1967).

When the Red Cross Charter is read in the light of this 1925 statute and the ruling in *Bankers Trust*, it is clear that federal jurisdiction will not be conferred by the use of general and unspecific language in "sue and be sued" clauses in a federal charter. As the First Circuit observed, "while § 1349 does not preclude an express grant of federal jurisdiction over such a corporation, *Banker's Trust* strongly suggests that a congressional grant of such jurisdiction should not be implied from ambiguous language." *S.G.* at 1498.



The Red Cross takes issue with this conclusion, alleging that it requires a presumption against jurisdiction that can only be overcome by unambiguous language. Red Cross Brief p. 27. This assertion is a misstatement of the First Circuit's position. The First Circuit was not creating presumptions. It merely observed that in view of the ruling in *Banker's Trust* and the explicit legislative policy underlying § 1349, federal jurisdiction over a congressionally chartered corporation should not be implied from ambiguous language. See *Collins v. American Red Cross*, 724 F. Supp. 353, 355 (E.D. Pa. 1989). Not only is this conclusion clearly justified by the holding in *Banker's Trust* and the legislative policy expressed in § 1349, it also reflects the guiding principle that the burden of proof is on the party seeking to establish federal jurisdiction and that any doubts will be resolved against that party. 1A *Moore's Federal Practice* § 1.168 [4-1]; 14A Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3721, p. 216, 217.

The Red Cross also observes that: "It is unclear whether Congress intended section 1349 to apply to the Red Cross, a nonstock corporation." This observation, at the very least, is disingenuous. The plain language of § 1349 makes clear that it applies to "any corporation" incorporated "by or under an Act of Congress." The Red Cross is one such corporation. Cf. *Burton v. United States Olympic Committee*, 574 F. Supp. 517 (C.D. Cal. 1983) (no federal question jurisdiction over breach of contract action against federally chartered organization); see also *Crum v. Veterans of Foreign Wars*, 502 F. Supp. 1377 (D. Del. 1980); *Rice v. Disabled American Veterans*, 295 F. Supp. 131 (D.D.C. 1968); *Harris v. American Legion*, 162 F. Supp. 700 (S.D. Ind. 1958).

The better view, one favored by this Court, is that the exception in § 1349 applies to all "government owned corporations," whether stock is issued or not. See *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 485 (1932); *Government National*

*Mortgage Association v. Terry*, 608 F.2d 14 (5th Cir. 1979); *Jackson v. Tennessee Valley Authority*, 462 F. Supp. 45 (M.D. Tenn. 1978); *Monsanto Co. v. Tennessee Valley Authority*, 448 F. Supp. 648 (N.D. Ala. 1978).

Finally, in several cases, Red Cross has argued that it is in fact controlled by the federal government and therefore falls within the exception set forth in § 1349. This contention has been uniformly rejected by district courts in which it has been asserted, each court ruling that the Red Cross functions independently of, and without control of, the United States Government. See *Griffith v. American Red Cross*, 678 F. Supp. 182, 185-186 (S.D. Ohio 1988); *C.H. v. American Red Cross*, 684 F. Supp. 1018, 1022 (E.D. Mo. 1987); *Collins v. American Red Cross*, *supra* at 355.

### **C. Comparison of the Red Cross Charter to the Charter in *Deveaux, Osborn, and Banker's Trust*.**

If there is one salient principle to be gleaned from the decisions in *Deveaux, Osborn, and Banker's Trust*, it is that if Congress intends to establish an "exceptional or privileged jurisdiction" in federal court over a federally created corporation, it refers to specific courts with the language of jurisdiction. In contrast, ordinary "sue and be sued" clauses do not refer to specific courts. As with the Red Cross, such clauses appear in the context of an enumeration of corporate powers such as the capacity to hold real and personal property, to accept gifts and devises, to adopt a seal and other emblems, to sue and be sued, and to do other similar acts. In this context, a general reference to a court system such as "courts of record" or "all courts of law and equity in the United States" will not be understood to enlarge the jurisdiction of any particular court, but rather "to give capacity to the corporation to appear as a corporation in any court which would, by law, have cognizance of the cause, if brought by individuals." *Deveaux*, 9 U.S. at 85-86.

To overcome the usual construction of these words there must be a clear and unambiguous reference to particular courts and a specific indication that the intent is to confer jurisdiction. That way, anyone who reads the charter will know that the language is used to enlarge the jurisdiction of a particular court, and not merely to grant capacity to sue and be sued, or in the case of a federal corporation, to waive immunity from suit.

When the language in *Osborn* is examined, an intent to enlarge the jurisdiction of circuit courts of the United States is clearly discernible. At that time (1824), Congress had a choice between two tiers of federal trial courts — the district courts and circuit courts. Congress chose the circuit courts and with particularity, referred to “any circuit court of the United States.”

Since Congress could not enlarge the jurisdiction of a state court, it provided that the Bank could sue and be sued in “all state courts of competent jurisdiction,” which clearly meant a state court of general jurisdiction with power and authority over the person and the cause. *Freudenberg v. Harvey*, 364 F. Supp. 1087, 1090 (E.D. Pa. 1973); *Hargrave v. Mid-Continent Petroleum Corp.*, 36 F. Supp. 233 (E.D. Okl. 1941). In the second Bank charter, Congress carefully chose its words and indicated that its concern went beyond capacity to sue and embraced jurisdiction as well. Thus, as to federal courts, Congress “excluded the jurisdictional caveat, simultaneously conferring the power to sue and expanding federal jurisdiction to include such suits.” *S.G.*, *supra*, at 1498.

In contrast to the second Bank charter, the Red Cross charter is ~~general~~ and unspecific. The Red Cross is simply granted the power “to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States.” 36 U.S.C. § 2. Unlike the second Bank charter, the federal court system is referred to only in the most generic sense. In short, the Red

Cross charter simply does not come close to meeting the *Osborn* standard. As stated in *Walker v. American National Red Cross*, No. 91-0749, Slip op. (D.D.C., May 14, 1991) (Revercomb, J.) (See Appendix, Respondent's Brief in Opposition to Petition for Writ of Certiorari, exhibit 20a):

[T]he language used in the Red Cross charter does not even meet the minimum requirements of *Osborn*. At the time the charter in *Osborn* was written, circuit courts of the United States were the federal courts of original jurisdiction and the charter stated that the bank shall be able to sue and be sued "in any circuit court of the United States." Unlike the charter in *Osborn*, the Red Cross charter does not specify that the Red Cross shall be able to sue or be sued in federal courts of original jurisdiction. If the Court interpreted the Red Cross charter as the defendant suggests it should, the Red Cross would also be permitted to sue or be sued in the Supreme Court, a Circuit Court of Appeals, or the Claims Court, which are federal courts of law and equity. The Court refuses to adopt this interpretation.

Red Cross argues that the mere use of the word "federal" in its charter automatically opens up the federal courts to it. However, this generic word has no magic or "talismanic" significance: By itself, it is no "open sesame" to federal courts. It has no special or technical meaning indicative of a conferral of jurisdiction on the district courts of the United States. In its use of general language, the Red Cross charter most closely resembles the federal charter in *Deveaux and Banker's Trust*. See *Anonymous Blood Recipient v. W. Beaumont Hosp.*, 721 F. Supp. 139, 144 (E.D. Mich. 1989).

It is also significant, as the First Circuit notes, that state and federal courts are given parallel treatment in the Red Cross charter. If Congress had in mind a conferral of state and federal jurisdiction over the Red Cross, it would have concerned itself with the fact that the jurisdiction of state courts is quite different from federal courts, and that while it had the power to extend federal court jurisdiction, it had no authority to change state court jurisdiction. These factors would require Congress, in dealing with the Red Cross' capacity to sue in state courts, to use entirely different language from its grant of jurisdiction to federal courts, as it did in *Osborn*. Treating state and federal courts with parallel generality is indicative of a grant of capacity to sue, not of jurisdiction.

Also, if the Red Cross argument is carried to its logical conclusion, in the future it will have the right to hop from one jurisdiction to the other. First, as in this case, it will assert, when sued in state court, that it has an absolute "right" to remove the case to federal court. Then, at some later time, when it is sued in federal court, it will assert that its charter gives it the "right" to invoke state court jurisdiction and have the case transferred to state court. Thus, through the general and parallel language of its charter, it will enjoy the best of both worlds. However, such a result was beyond the fondest imagining of Congress when it drafted this charter.

Finally, the historical development of "federal question" jurisdiction, and in particular, federal jurisdiction over corporations deriving their charters from an act of Congress, indicates a trend toward strict construction of "sue and be sued" clauses in federal charters. When Chief Justice Marshall interpreted the charter of the second Bank in *Osborn* (1824), he was interpreting its charter in the light of the *constitutional* grant of federal question jurisdiction under Article III, and thus, he gave



it an expansive and liberal construction,<sup>3</sup> which in more recent times has come under attack. Hart & Wechsler, *The Federal Court and the Federal System*, 866-67 (2nd Ed 1973).

As noted above, there have been some very significant changes in federal question jurisdiction since 1824. In 1875, the circuit courts were given jurisdiction over federal question cases. Since then, this Court has differentiated between the broad grant of "arising under" jurisdiction in Article III and the narrower statutory jurisdiction under 28 U.S.C. § 1331. See *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480 (1983) and *Romero v. International Term. Operat. Co.*, 358 U.S. 354, 386 (1952). Also, in 1915 and 1925, Congress acted to stem the flood of cases in federal court arising from the mere fact of federal incorporation. See 28 U.S.C. § 1349; *Murphy v. Colonial Fed. Savings and Loan Association*, *supra*. These developments may well account for the requirement in *Banker's Trust* of clear and unambiguous language in order to confer federal jurisdiction in a federal charter. See *S.G. v. American National Red Cross* at 1498. Opening up the federal courts to a deluge of suits against the Red Cross (as well as federal entities with similar charters)<sup>4</sup> on the basis of doubtful and ambiguous language, would tend to substantially undermine and reverse this salutary trend of statutory interpretation and legislative policy over the past century.

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3. It is also likely that the Chief Justice was motivated by a desire to provide the second Bank with a federal haven for its litigation, as it was an object of great popular hatred and measures of reprisal by state legislatures. See Shulman and Jaeger, 45 *Yale Law Journal*, 404, 405 (1936); Dissent of Mr. Justice Frankfurter in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 at 481.

4. This would often occur in cases where the only "federal question" appeared in the federal act of incorporation.



**D. The D'Oench Case Supports a Non-Jurisdictional Interpretation of *The Red Cross Charter*.**

The Red Cross relies primarily upon the *Osborn* case. However, it also argues that the decision in *D'Oench D. and Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1941), supports its position. In *D'Oench*, the FDIC sued D'Oench D. & Co. on a demand note and the main point of controversy revolved around the question of what law was applicable: Illinois, Missouri or federal common law. The Court concluded that Congress intended the parties to be governed by federal common law. The Red Cross points out that, during the course of its opinion, the Court made this comment:

The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue and be sued "in any court of law or equity, State or Federal."

315 U.S. at 455, 456. The *D'Oench* Court also recognized, however, that the FDIC charter expressly provided that:

All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States . . .

Red Cross points to the similarity between the language in its charter and that of the FDIC, and argues that this Court ruled that the "sue and be sued" language in the FDIC charter created federal jurisdiction over it. However, the FDIC charter must be read as a whole, and not piece-meal as the Red Cross would have us do. When the charter is taken as a whole, it is clear that the

“deemed to arise under” language in the FDIC charter actually confers federal jurisdiction rather than the “sue and be sued” clause.

The Red Cross argues that this Court attached no significance to the “deemed to arise under the laws of the United States” clause because it was relegated to a lowly footnote. Red Cross Brief p. 21. This argument is meritless. As the Court said in *Collins v. American Red Cross*, *supra* at 356:

The Red Cross seeks to minimize this by arguing that the Court “relegated this provision to a footnote.” It seems to the Court that anything the Supreme Court finds it worthwhile to say should be regarded as meaningful. The Court is aware that yesterday’s footnote may form the basis of tomorrow’s holding.

*See also Lockett v. Harris Hospital-Fort Worth*, 764 F. Supp. 436, 440 (N.D. Tex. 1991).

Recognizing that it has a hard sell because of the presence of this additional clear and unambiguous language in the FDIC charter, the Red Cross, for solace, turns to the concurring opinion of Mr. Justice Jackson, where he comments as follows on jurisdiction:

This case is ~~not~~ entertained by the Federal courts because of diversity of citizenship. It is here because a Federal agency brings the action, and the law of its being provides, with exceptions not important here, that:

“All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States.”

That this provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision that the Corporation may sue and be sued "in any court of law or equity, state or Federal."

*D'Oench* at 467.

First of all, it should be noted that Mr. Justice Jackson, in his concurring opinion, speaks for himself and not the Court.<sup>5</sup> Secondly, Mr. Justice Jackson does not say that the "deemed to arise provision" is not jurisdictional. Rather, he argues that Congress by the use of this language, intended, *in addition to* the grant of federal jurisdiction, that the case be governed by federal common law. To read more into this statement, as Red Cross tries, is completely unwarranted.

The Red Cross also argues that the issue of federal jurisdiction was raised and litigated in *D'Oench*. However, the record does not support this contention. The *D'Oench* Court did not interpret the meaning of the "sue and be sued" clause as in *Deveaux*, *Osborn*, and *Banker's Trust*. "Neither the parties nor the Court directly raised the validity of subject matter jurisdiction under the FDIC charter." *S.G.*, at 1498-1499. *See also Collins v. American Red Cross*, at 356.

Moreover, the legislative history of the FDIC statute actually supports a non-jurisdictional reading of the Red Cross charter. Commenting on this legislative history, the Court in *Walton v. Howard University*, 683 F. Supp. 826, 828 (D.D.C. 1987), said:

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5. Red Cross also refers to statements in a brief filed by the Solicitor General in the *D'Oench* case (Red Cross Brief, p. 22) but the *D'Oench* Court makes no mention of this brief in its decision. Needless to say, the Solicitor General does not presume to speak for this Court.

The Banking Act of 1933 expressly provided that the F.D.I.C. could sue or be sued "in any court of law or equity. State or Federal." 48 Stat. 162, 168, 172.

The Banking Act of 1935 amended that act, and one of the changes was the addition of the language quoted above. The express purpose of this [deemed to arise under] amendment was to "give jurisdiction, in the case of suits of a civil nature to which the Corporation is a party, to courts having jurisdiction of suits arising under the laws of the United States." S.Rep. No. 1007, 74th Cong., 1st Sess. 5 (1935). See *Federal Deposit Insurance Corp. v. George Howard*, 153 F.2d 591, 593 (8th Cir. 1946) *cert. denied*, 329 U.S. 719, 67 S.Ct. 53, 91 L.Ed. 623 (1946) (special provision can only mean that suit involving F.D.I.C. is within jurisdiction of federal district courts). *Clearly, if Congress believed that the express power to litigate in federal courts was sufficient to create original jurisdiction in those courts, this amendment would not have been necessary.* Nothing in the committee report cited above indicates that the amendment was meant to clarify any pre-existing federal question jurisdiction.

(Emphasis added).

Since the "arising under" amendment occurred in 1935, it is evident that Congress, some 12 years before the "state or federal" language was added to the Red Cross charter knew and used the appropriate specific language to confer federal jurisdiction over actions involving the FDIC. It is also likely that it looked upon the earlier "sue and be sued" language in the FDIC charter

as merely conferring the capacity to litigate. When one considers *D'Oench* in the light of the FDIC charter read as a whole, and its legislative history, it is relevant to this appeal, and strongly supports the respondent's position that the Red Cross charter was only intended to confer a capacity to litigate.

#### **E. Legislative History of the 1947 Amendment to the Red Cross Charter.**

The primary focus of the Red Cross brief is on the *Osborn* case; and it urges that *Osborn* is dispositive of the issues in this case. Of considerably less significance to the Red Cross is the legislative history of the 1947 amendment. The respondents believe this is an illogical and distorted approach. The paramount and overriding issue in this case is what Congress intended by the 1947 amendment to the Red Cross charter, and in this context the legislative history of the amendment is of great importance.

Although the burden is on the Red Cross to satisfy this Court of its "right" to invoke federal jurisdiction, it has given this Court only a skimpy, bird's-eye view of the legislative history of the 1947 amendment. While it has provided this Court brief excerpts from the so-called Harriman Report, which it claims served as the genesis for the 1947 amendment, it has failed to furnish the Court with a significant transcript of the hearing on S.591 (the Senate Bill which served as the prototype for the 1947 amendment), or the Senate and House Reports on this Bill. While one begins with the words used by Congress, the context, and anything which is logically relevant to the ascertainment of meaning should be considered as well. See Frankfurter, *Reading of Statutes*, 47 Colum. L. Rev. 535-541. As Chief Justice Marshall once observed, "where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). The reason that the Red Cross gives this legislative history short shrift and even

belittles this approach (Red Cross Brief, p. 30) is obvious; the legislative history does not support the Red Cross position, and in fact, contradicts it.

Initially, the Red Cross argues that Congress had a right to rely upon *Osborn* in drafting the 1947 amendment, and that *Osborn* was still good law at that time. However, there is not a shred of evidence that Congress, in 1947, had *Osborn* in mind. There is no mention of *Osborn* in the Senate Committee hearing, or in the Senate and House Reports (or, for that matter, in the Harriman Report).

Further, the Red Cross charter, as amended in 1947, does not bear even the slightest resemblance to the second Bank charter. If Congress wished to pattern its amendment after the holding in *Osborn* it would have used "altogether different words." See *Banker's Trust Co.*, *supra* at 303. One possible approach would have been the following:

To sue and be sued in all state courts of competent jurisdiction, and in any district court of the United States.

This is hardly a complicated piece of draftsmanship, and would have indicated a reliance on *Osborn*.

Moreover, the very process of determining congressional intent in 1947 by regressing to the 1824 Bank Charter is open to serious question. As the Court said in *Anonymous Blood Recipient v. W. Beaumont Hosp.*, *supra* at 143, *Osborn* "interpreted a different federal charter, a charter from a different era, with a different purpose set in a different context."

While the Red Cross gives the legislative history only fleeting attention, it does not entirely ignore the legislative context. In



particular, it relies upon Recommendation 22 of the Red Cross Advisory Committee, also known as the Harriman Committee. This Committee was formed to recommend changes in the Red Cross charter to make the governing board more representative and to insure the most effective handling of its programs. See The American National Red Cross Report of the Advisory Committee on Organization, at 3, 15 (June 11, 1946). In the last section of its report, entitled "*Miscellaneous Recommendations*," the committee recommended that the charter clarify the status of the Red Cross as a litigant in federal court.

*Recommendation No. 22. The Charter should make it clear that the Red Cross can sue and be sued in the Federal Courts.* The present Charter gives the Red Cross the power to "sue and be sued in courts of law and equity within the jurisdiction of the United States." The Red Cross has in several instances sued in the Federal Courts, and its powers in this respect have not been questioned. However, in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the Charter.

This recommendation apparently led Congress to amend the "sue and be sued" clause in the Red Cross charter by adding the words "state or federal." Even if we assume that Congress acted in direct response to this recommendation,<sup>6</sup> the inserted language does not support the expansive grant of federal jurisdiction urged by the Red Cross. The Report is ambiguous at best, and when the language of the amendment "state or federal" is matched up to Recommendation 22, it is more likely

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6. Congress adopted most of the recommendations of the Report, but not necessarily its language. See S. Rep No. 38, 80th Cong. 1st Sess. — U.S. Code Cong. Ser. 1028; *Collins v. American Red Cross*, *supra* at 357.

that Congress was attempting to clarify capacity to litigate in federal courts when jurisdiction was otherwise present (diversity or federal question) rather than confer federal jurisdiction over the Red Cross. The use of the word "can" in the first sentence, and the word "power" in the second sentence of Recommendation 22 indicates the Committee was concerned with capacity to litigate rather than jurisdiction. See *Roche v. American Red Cross*, 680 F. Supp. 449, 453 (D. Mass. 1988). The obvious purpose of the Recommendation is to confirm the Red Cross's *capacity* to litigate in federal court, and it is significant that the report specifically mentions that the Red Cross had done so in the past. See e.g. *Lovskog v. American National Red Cross*, 111 F.2d 88 (9th Cir. 1940); *American Red Cross v. Raven Honey Dew Mills*, 74 F.2d 160 (8th Cir. 1934).

Two developments since the adoption of the original Red Cross Charter in 1905 may have prompted this attempt to clarify its *capacity* to litigate in federal court. First, when the 1905 charter was adopted, the Red Cross, as a federally chartered corporation had a right to invoke federal jurisdiction under the ruling in the *Pacific Railroad Removal Cases*. However, in 1925 Congress passed the predecessor statute to 28 U.S.C. § 1349 which precluded federal jurisdiction over a federally chartered corporation unless the corporation was owned or controlled by the United States.

Second, a body of law developed after 1905 strongly suggested that corporations created by an Act of Congress, and whose business was not confined to a particular state, had no state citizenship for diversity purposes. See *Bankers Trust*, *supra* at -1016; *First Carolinas Joint Stock Land Bank of Columbia v. New York Title & Mortgage Co.*, 59 F.2d 350, 351 (D.C.S.C. 1932).

In this murky state of the law, as it had evolved since 1905, the Red Cross might well have desired to clarify its capacity to litigate in federal court when jurisdiction otherwise existed by

diversity or an independent federal question. In *Walton v. Howard University, supra* at 829, the Court discussed the clarifying effect of the amendment in the field of diversity:

The inclusion of the word "Federal" in the charter amendment apparently did have the effect of clarifying the Red Cross' ability to sue in diversity under 28 U.S.C. § 1332. Although the Red Cross was created as "a body corporate and politic in the District of Colombia," 36 U.S.C. § 1, it is also a federally created corporation. Generally, federal corporations are considered citizens of the United States, but not of any particular state, and they cannot sue in diversity. See *Burton v. U.S. Olympic Comm.*, 574 F. Supp. 517 (C.D. Cal. 1983).

The Red Cross also refers to the Senate Foreign Relations Committee Hearing on S-591, the bill which Congress eventually passed as the amendment to the Red Cross Charter. The Red Cross selectively quotes Senator George as follows:

I think the purpose of the bill is very clear, and that is to give the jurisdiction in State Courts and Federal Courts, and I think we had better leave it there.

Red Cross Brief p. 5 6. What Senator George meant by this comment is far from clear because, later in the hearing, he remarked:

I think there might be some question about the right of a federal corporation to be sued in a *State* court. *I thought that was, and I still think it is the purpose of this provision.*

American National Red Cross Hearing on S-591 before the Senate Committee on Foreign Relations, 80th Cong. 1st Sess. (Appendix P) (Emphasis added).

Another major part of the hearing centered on whether the proposed amendment ("state or federal") actually limited the powers of the Red Cross by not giving it the ability to litigate in foreign courts. This discussion, which went on at some length, shows that Senators White, Connally, and Thomas viewed the provision as a grant of corporate power rather than federal subject matter jurisdiction. As the Court in *Walton v. Howard University*, *supra* at 829, commented,

It would be difficult to conclude from the remarks made during the hearing that the Committee intended to cause litigation involving the Red Cross to arise under the laws of the United States, and thereby to expand the original jurisdiction of the federal courts.

Finally, it is significant that neither the Senate nor House Reports on S-591 makes any mention of the jurisdictional point. S. Rep. No. 38, 80th Cong. 1st Sess., 1947 U.S. Code Cong. Serv. 1028; House Report No. 337, Committee of the Whole House, May 6, 1947.

It is also evident that, for many years, both before and shortly after 1947, Congress followed a practice of using clear and explicit language to confer federal jurisdiction over corporations it had created. First, in 1935, it amended the FDIC charter with the "deemed to arise under" language discussed above in Section IV. Next, some 11 weeks after amending the Red Cross Charter (August, 1947) Congress adopted legislation amending the charter of the Federal Crop Insurance Corporation ("FCIC"). The FCIC's amended charter provided that it may "sue and be sued in its

corporate name in any court of record of a state having general jurisdiction or in any United States district court and jurisdiction is hereby conferred on such district court to determine controversies without regard to the amount in controversy.” Act of August 1, 1947, Ch. 440 § 7, 61 Stat. 719 (now 7 U.S.C. § 1506). Similar to the FDIC, the FCIC’s original charter contained the phrase, “sue and be sued in any court of competent jurisdiction, state or federal”; Congress later felt obliged to add clear and explicit language to confer federal jurisdiction.

Finally, in 1948, when Congress created the Commodity Credit Corporation (“CCC”), it provided that the “District Courts of the United States . . . shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by and against the corporation.” Act of June 29, 1948, Ch. 704 § 4, 62 Stat. 1070. It is obvious from those several statutes, extending from 1935 to 1948, that in 1947 Congress knew explicitly how to establish independent federal jurisdiction. See *Griffith v. American Red Cross*, *supra* at 185.

The Red Cross argues that the FCIC and CCC are not relevant because they were enacted shortly after the Red Cross Charter. However, in determining congressional intent, this Court has never limited itself to the exact time when legislation is passed as Red Cross suggests. As Mr. Justice Frankfurter observed:

Courts examine the forms rejected in favor of the words chosen. They look at statutes “considered to throw a cross light” on an earlier enactment.

Frankfurter, 47 Colum. L. Rev. Reading of Statutes, *supra* at 543. See also *United States v. Hutchison*, 312 U.S. 219, 236 (1940), *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2nd Cir. 1945).



The Red Cross argues that the First Circuit's interpretation of the 1947 amendment renders it a nullity. Red Cross Brief at 41. However, if the Harriman Committee and Congress viewed the Red Cross capacity to litigate in federal court as doubtful, or even unclear, in the light of changes in the law since 1905, then the amendment served a very useful purpose.

In this regard it should be noted that four years after the amendment was adopted, the Red Cross litigated the issue of federal diversity jurisdiction in *Patterson v. American Nat. Red Cross*, 101 F. Supp. 655 (S.D. Fla. 1951). In that case, the Red Cross removed a suit against it to federal court based on diversity jurisdiction, and opposed the plaintiff's motion to remand. Neither the parties nor the Court suggested that the 1947 amendment had created a new basis for federal jurisdiction; rather, it was viewed simply as confirming the right of the organization to invoke diversity jurisdiction. From *Patterson*, one may legitimately conclude that the *Osborn* theory of a grant of federal jurisdiction to the Red Cross was of relatively recent origin, possibly as late as 1987. See *C.H. v. American Red Cross*, *supra*, Slip op. (April 3, 1987).

Finally, even if we assume that Congress intended to confer the right to invoke federal jurisdiction on the Red Cross, the words it used did not express that purpose. As the First Circuit observed, the amendment may have been "ineptly drafted." *S.G.* at 1501. However, the failure of Congress to express its intent with the proper language of jurisdiction cannot be remedied by judicial interpretation. As this Court said in *Iselin v. United States*, 270 U.S. 245, 250 (1926):

What the government asks is not a construction of a statute, but, in effect, an enlargement of it so that what was omitted, presumably by inadvertence, may be included within its scope. To



supply omissions transcends the judicial function.

The remedy that the Red Cross seeks is available only by legislative action, not judicial decree.

#### **F. The Constitutional Question.**

There is another reason to conclude that Congress did not intend to confer federal jurisdiction over all cases to which the Red Cross is a party: any other interpretation would present the serious constitutional question of whether Congress, in enacting the 1947 amendments to the Red Cross charter, exceeded the scope of Article III of the United States Constitution. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989) (stressing the "importance [the Court] ha[s] consistently attached to interpreting statutes to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction").

It is well established that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by Article III. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). Article III confines the judicial power of the United States to two classes of cases, those relating to the status of the parties, and those relating to subject matter. With respect to subject matter, the judicial power extends to maritime and admiralty cases (not relevant here) and "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties." Thus, Congress' authority to confer original federal jurisdiction over the Red Cross depends on whether all cases to which it is a party — including those, like the one presented here, that solely involve questions of state law — can be deemed to "arise under" the laws of the United States.

The only conceivable basis for such a conclusion would be the Red Cross' status as a federally chartered corporation, relying

on cases such as *Osborn* and *Pacific Railroad Removal Cases*, *supra*. In *Osborn*, this Court stated that all suits involving the Bank of the United States could be deemed to "arise under" federal law within the meaning of Article III because its "[federal] charter of incorporation not only creates it, but gives it every faculty which it possesses." 22 U.S. at 823. For this reason, the Court concluded that the clause in the Bank's charter giving it the right to sue and be sued in the circuit courts "is consistent with the constitution." *Id.* at 827. Similarly in the *Pacific Railroad Removal Cases supra*, this Court, relying on *Osborn*, held that cases involving federally incorporated railroads "arose under" the laws of the United States because the railroads "not only derive[d] their existence, but their powers, their functions, their duties, and a large portion of their resources from those Acts, and, by virtue thereof, sustain[ed] important relations to the Government of the United States." *Pacific Railroad, supra*.

These cases, however, have been roundly criticized as based on an unduly broad interpretation of the meaning of "arising under" in Article III and 28 U.S.C. § 1331. This Court has recently observed that "the breadth of [*Osborn's*] conclusion has been questioned . . . [since], taken at its broadest, *Osborn* might be read as permitting 'assertion of original federal jurisdiction on the remote possibility of presentation of a federal question.' " *Verlinden*, 461 U.S. at 492 (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (Frankfurter, J., dissenting)); see also Hart & Wechsler, *The Federal Courts and the Federal System*, 866-67 (2d ed. 1973). This Court has also criticized the *Pacific Railroad Removal Cases* as "an unfortunate decision," see *Romero v. International Term. Operat. Co.*, 358 U.S. 354, 379 n.50 (1958), and Congress has severely limited that decision by

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7. *Verlinden* declined to reconsider *Osborn*, however, since the case before it, unlike *Osborn*, "[did] not involve a mere speculative possibility that a federal question may arise at some point in the proceeding." *Id.*

the enactment of 28 U.S.C. § 1349. Thus, the continued validity of this Court's broad interpretation of "arising under" in *Osborn* and *The Pacific Railroad Removal Cases* is uncertain, to say the least.

If this Court holds that Congress, in enacting the 1947 amendments to 36 U.S.C. § 2, did intend to confer original federal jurisdiction over all cases involving the Red Cross, it must reach the issue of whether *Osborn's* broad interpretation of Article III remains good law. We submit that it does not, as there is no basis to conclude that the Framers intended to permit Congress to confer original federal jurisdiction over all cases, including garden-variety, state law contract disputes and tort cases, that happen to involve federally-chartered corporations.<sup>8</sup> Although there is no question that such authority exists with respect to cases involving federal instrumentalities (such as the FDIC and the CCC), which are controlled by, and function as an arm of, the United States government, and for which Article III provides a separate basis for federal court jurisdiction ("Controversies to which the United States shall be a Party"), the mere involvement of an independent, federally chartered corporation such as the Red Cross should not be understood to transform a common law tort action into a federal case. See *C.H. v. American Red Cross*, 684 F. Supp. at 1018 (the Red Cross "functions independently and is in no way controlled by the federal government").

Indeed, viewed *de novo*, it is difficult to see how this sort of a federal charter has any significance whatsoever for purposes of deciding whether a state law tort or contract claim against the

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8. Indeed, the Red Cross' argument, by allowing *any* claim involving the Red Cross to be brought in, or removed to, federal court, would force the federal court to adjudicate hundreds of small state law claims that involve diverse parties, but do not meet the jurisdictional amount for diversity cases. See 28 U.S.C. § 1322(a).

corporation "arises under the laws of the United States" for purposes of Article III. Stated another way, a corporation's status as a federally chartered entity has nothing to do with the question of whether claims by or against it arise under federal law. The Framers devised a federal government of limited powers, with a judiciary of limited reach, and it would be at odds with such a system to allow, under Article III, jurisdiction over cases where there is no overriding federal interest and no applicable substantive law. See e.g. *Mossman v. Higginson*, 4 U.S. (4 Dall) 12 (1800) and *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How) 443 (1852).

Because Red Cross' interpretation of its charter raises serious questions as to its constitutionality, the Court should reject Red Cross' claim that Congress intended to confer original federal jurisdiction over all cases involving the Red Cross.

#### **G. Policy Considerations.**

At the outset, it should be noted that whether the HIV cases are tried in state court or federal court, the tort law of the forum state will determine the outcome of the case. 28 U.S.C. § 1652 provides that: "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." All of these HIV suits arise from state common law negligence or related tort law and not from the Constitution or laws of the United States. In this situation, Congress, for most of this century, has consistently followed a policy of limiting federal jurisdiction (except for government owned corporations and agencies) to those situations where the controlling law is federal. As the Court said in *Doe v. American Red Cross*, *supra*, at 192:

The thrust of Congressional policy since 1925 has been to limit federal-question jurisdiction of cases not involving government instrumentalities to those situations in which the governing law is federal. The policy is a sound one. It respects the balance of authority between state and federal courts which is an essential ingredient of the federal system.

*See also Lockett v. Harris Hospital-Fort Worth*, 764 F. Supp. 436, 441, 442 (N.D. Tex. 1991).

Behind this policy of carefully limiting federal jurisdiction to cases governed by federal issues is a concern that the federal courts will become inundated with cases which are really governed by state law. The Court in *Collins v. American Red Cross*, *supra*, at 358, voiced this concern:

While certainly not dispositive, it might be noted that a finding of original federal jurisdiction here would open at least one "floodgate." It could well federalize all Red Cross cases. Not only would the emerging wave of contaminated blood cases be added to federal dockets but so could every contract dispute between a supplier and Red Cross chapter, as well as personal injury cases involving allegedly defective conditions on Red Cross premises or negligent acts by Red Cross agents and employees, to cite but a few examples.

It also should be borne in mind, that a decision favorable to Red Cross, very well could open up the federal courts to countless suits by and against federal agencies and corporations with similar charters, even when the dispositive issue is one of state law. At present lower federal courts have tended to construe federal charters, with language similar to that of the Red Cross,



as a grant of capacity to sue or a waiver of sovereign immunity, but not as a conferral of federal subject matter jurisdiction. This trend will soon cease if the Red Cross prevails in this case. In short, once the nose of the camel (Red Cross) is in the tent the rest of the camel (countless federal entities) will surely follow.

A second policy issue of equal significance is whether the plaintiffs in this case, and in other HIV cases, should be compelled to try their suits in two separate forums. In almost all, if not all, of these cases there are separate suits against a hospital and a doctor. The suits would ordinarily be joined and tried together. Unless the separate Red Cross action is removed to federal court, the plaintiff will litigate all claims in one court. This way the plaintiff is not put to the expense and ordeal of trying his or her case twice in different forums with the attendant risk of inconsistent verdicts, and the obvious waste of scarce judicial resources.

The Red Cross concedes that this is a problem for respondent, as the District Court already rejected pendent jurisdiction in her case, *see* Appendix, Petition for Writ of Certiorari, exhibit 24a, but blithely asserts that it will not be a problem in the future due to the adoption in 1990 of the "supplemental jurisdiction" statute, 28 U.S.C. § 1367(a). Since there are constitutional limitations on the exercise of supplemental jurisdiction, it is unclear whether this statute would allow the state claims to be tried along with the Red Cross case in federal court. The test is still whether the state and federal claims derive from a common nucleus of operative fact, and whether, without regard to their state or federal character, a plaintiff's claims are such that she would ordinarily be expected to try them in a single judicial proceeding. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Since the new statute has not been interpreted, it is impossible to know whether joinder and trial of the state and (as the Red Cross would have it) federal claims will be allowed. Also the enactment of this



supplemental jurisdiction statute is of small consolation to the respondents here as it took effect on December 1, 1990, and was not retroactive.<sup>9</sup>

While acknowledging these arguments, the Red Cross urges that its status as a federal instrumentality entitles it to federal jurisdiction in suits by and against it. However, it should be noted that the Red Cross is a federal instrumentality only in a very limited sense. It is neither owned nor controlled by the United States. The vast majority of its workers are volunteers and its employees are not employees of the United States. *Dept. of Employment v. United States*, 385 U.S. 355, 360 (1966). The United States does not appropriate any funds to assist the Red Cross in implementing its charter powers and duties, and government officials do not direct the everyday affairs of the Red Cross. It is true that the Red Cross is required to submit a report of receipts and expenditures to the Secretary of Defense, which is then audited and forwarded to Congress. It is also true that the President appoints eight of the fifty-member Board of Governors of the Red Cross, but neither of these facets of government supervision amount to federal control. In fact, if the Red Cross were truly under federal control, it would lose the independent and autonomous status necessary for it to carry out its duties under the Geneva Conference and as a member of the International Red Cross. See Sturges, *The Legal Status of the Red Cross*, 56 Mich. L. Rev. 1 (1957). It must retain its political, religious, and economic independence in order that it be viewed by the peoples of the world as an institution which owes its primary allegiance to the alleviation of human suffering, and not to any nation or group of nations. See *Irwin Memorial Blook Bank of The San Francisco*

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9. Respondents wish to emphasize that they, and the state court defendants, have no aversion to a trial in federal court but do wish to try all cases together in one forum. Due to the ruling of the District Court denying pendent jurisdiction, the state forum is the only one open to all parties.

*Medical Society v. American Nat. Red Cross*, 640 F.2d 1051, 1056-1057 (9th Cir. 1981).

Whatever its status may be as a "federal instrumentality," the Red Cross argues that it should be immune from punitive damages and "jury trial demands." It urges that these are federal questions which require federal determination and advances two reasons for federal jurisdiction: "(1) The need for uniformity in the determination of these federal issues, (2) The Red Cross needs to be insulated from local prejudices and pressures." Red Cross Brief p. 36.

Neither of these reasons is particularly convincing. First, there is no assurance of uniformity when federal courts address Red Cross issues. The district courts, and courts of appeals in over twenty cases are evenly split on whether the Red Cross' charter entitles it to federal jurisdiction. Also, this Court has frequently ruled that there is no general right to have federal questions answered by a federal court, absent some established basis for federal jurisdiction, and that state courts are empowered to decide federal statutory issues where appropriate. See *Hathorn v. Lovern*, 457 U.S. 255, 266 (1982); *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 478 (1981).

To be sure, a ruling against the Red Cross would deny it an "exceptional and privileged" federal jurisdiction, but this would not deprive it of independent federal question and diversity jurisdiction. Cf. *Cupo v. Community National Bank & Trust Co. of N.Y.*, 438 F.2d 108 (2d. Cir. 1971). In the case of federal agencies, they would also have the right to invoke federal jurisdiction if owned or controlled by the government under 28 U.S.C. § 1349, See *Sabin v. Home Owners Loan Corporation*, 147 F.2d 653, 656 (10th Cir. 1945), *cert. denied*, 326 U.S. 759 (1945), or if the federal agency acts for the government within the meaning of 28 U.S.C. § 451 and 28 U.S.C. § 1345. See

*Government Nat. Mortg. Ass'n v. Terry*, 608 F.2d 614 (5th Cir. 1979).

Local prejudice was undoubtedly a factor in the *Osborn* Court's decision. The second Bank was an object of "popular hatred and legislative reprisals." But the Red Cross is held in high esteem by citizens throughout this country and the Red Cross has failed, with its unsubstantiated assertions, to show any need for a federal haven from local prejudice.

In fact one wonders, in view of the weakness of these assertions, whether the real reason for the Red Cross' desire for federal jurisdiction arises more from tactical considerations; *i.e.*, to force respondents to try their cases in two forums, and to separate itself from the state suits so that blame may be cast on the absent defendants. It is highly unlikely that these tactical concerns were ignored by the Red Cross.

## II.

**SINCE THE "FEDERAL QUESTION" DEBATED HEREIN IS NOT AN ESSENTIAL ELEMENT OF THE UNDERLYING CAUSE OF ACTION, NO PERTINENT FEDERAL QUESTION APPEARS ON THE FACE OF THE RESPONDENTS' WELL-PLEADED COMPLAINT, AND THE RED CROSS IS NOT ENTITLED TO REMOVE THE SUIT AGAINST IT TO FEDERAL COURT.**

Even if the Red Cross establishes that 36 U.S.C. § 2 confers original federal jurisdiction, it still must satisfy the requirements of the well-pleaded complaint rule. This rule allows removal of "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction*

*Laborers Vac. Trust*, 463 U.S. 1, 27-28 (1983).

This rule first emerged in the case of *Little York Gold Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877) some two years after Congress had conferred federal question jurisdiction on the Circuit Courts of the United States. Since then, in an unwavering series of cases from 1877 to the present time, this Court has emphasized that the federal question must appear on the face of the plaintiff's well-pleaded complaint, unaided by anything alleged in anticipation or avoidance of defenses. See e.g. *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914).

The rule is not one which simply requires good pleading; it forms the basis for federal question jurisdiction. Since it relates to subject matter jurisdiction, this Court has sometimes raised the issue of its own motion. *Louisville & N.R. Co. v. Mottley*, 211 U.S. 149 151 (1908).<sup>10</sup>

Over the years many different statements of the rule have appeared. In the leading case of *Gully v. First Nat. Bank*, 299 U.S. 109, 112 (1936), the Court stated the rule as follows:

To bring a case within the statute, a right or immunity created by the constitution or laws of the United States must be an element and an essential one, of the plaintiffs cause of action.

The most recent and comprehensive statement of the rule appears in *Franchise Tax Bd. v. Laborers Vac. Trust*, *supra*, at 27-28, where this Court said:

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10. In the instant case the respondents raised the issue in the Court of Appeals (See S.G. at 1496, Footnote 2) and in this Court. Respondent's Brief in Opposition to Petition for Writ of Certiorari, 10-11).

Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief depends on resolution of a substantial question of federal law.<sup>11</sup>

In applying the well-pleaded complaint rule, this Court has repeatedly stated that the party who brings a suit is master to decide what law he will rely upon. *See e.g. The Fair v. Kohler Die and Specialty Co.*, 228 U.S. 22, 25 (1913).

Turning to the complaint in this case, *See Appendix, Brief in Opposition to petition for Writ of Certiorari*, exhibits 3a-5a, the respondents allege that the Red Cross was negligent in failing to properly screen blood donors and that as a result, S.G. became infected with HIV virus. The suit clearly and unmistakably arises out of the common law of New Hampshire. From the face of this complaint, it is obvious that federal law does not create the cause of action, nor does the plaintiff's right to relief depend on resolution of a substantial question of federal law.

The issue of federal question jurisdiction under the wellpleaded complaint rule has arisen from time to time in cases of federal agencies with "sue and be sued" clauses. In *Mullins v. First National Exchange Bank of Virginia*, 275 F. Supp. 712 (W.D. Va. 1967) the Court ruled as follows on the contention that the "sue and be sued" clause of the Small Business Administration gave rise to federal jurisdiction:

Nor does the classification of the Small Business

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11. This Court has applied this rule as recently as March 29, 1989. *See Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989).



Administration of a "sue and be sued" agency without more suffice to establish federal question jurisdiction. To hold otherwise would be tantamount to a finding that any time a sue and be sued agency is listed as a party defendant the case would automatically be one arising under the laws of the United States. Such a result would be inconsistent with the holding in *Gully v. First National Bank*, 229 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936). *Gully* requires that the right created by the federal law must be an essential element of the plaintiffs' cause of action. *Merely the naming* of a federal agency as a defendant does not mean that the merits of the action must necessarily turn upon a federal law.

(Emphasis added).

Admittedly, the issue has not often arisen in the HIV suits against the Red Cross. Usually, the district courts have treated the issue of whether 36 U.S.C. § 2 is a grant of federal jurisdiction as dispositive, and have not given consideration to whether the plaintiff's cause of action arises under state or federal law. In one case, however, the Court ruled that 36 U.S.C. § 2 was an express grant of federal jurisdiction, but nonetheless remanded the suit against the Red Cross to state court for the following reasons:

Plaintiff's claims against defendant American Red Cross are *state law claims*. The claims are not 'founded on a claim or right arising under the Constitution, treaties or laws of the United States' [28 U.S.C. 1441(b)]. Thus this action was removable only if no defendant was a Missouri citizen. Defendant St. Louis Children's Hospital



is a Missouri citizen. Thus this action was not removable pursuant to 28 U.S.C. § 1441 (a) and (b).

*Conway v. St. Louis Children's Hospital and American Red Cross*, Slip op. No. 86-2138C (1) (E.D. Mo. July 1, 1988) (emphasis added).

When the respondents raised this issue in the Court of Appeals and in this Court, the Red Cross termed this argument "frivolous" See Reply Brief, Petition for Writ of Certiorari, p. 6 and responded only in a general and conclusory fashion.

First, the Red Cross asserted that the well-pleaded complaint doctrine was an "interpretation of 28 U.S.C. § 1331" (arising under jurisdiction) and had no relevance to cases in which federal jurisdiction is conferred by a different statute, such as 36 U.S.C. § 2. Respondents assert that § 1331 is fully applicable to any right of the Red Cross to invoke federal jurisdiction based on 36 U.S.C. § 2.

Congress only has authority to grant jurisdiction to the United States District courts in accordance with Article III of the United States Constitution.<sup>12</sup> Mr. Justice Frankfurter in his dissent in *National Mutual Ins. Co. v. Tidewater T. Co.*, 337 U.S. 582, 649, 650 (1949) explored the limits of District Court jurisdiction, as follows:

Courts set up under Article 3 to exercise the judicial power of the United States do so either because of the nature of the subject-matter or because of

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12. Courts established pursuant to Article III, the Judiciary Article, such as District Courts are deemed to be Constitutional Courts. See 1 *Moore's Federal Practice* § 0.4[2].

the special position of the parties. So far as the subject-matter is concerned it extends to cases arising under the "Constitution, the Laws of the United States, and Treaties," as well as "to all Cases of admiralty and maritime Jurisdiction."

Insofar as the courts established under Article 3 can entertain a case not involving the Constitution, the laws of the United States or treaties, nor concerning admiralty, they do so because of the status of the parties, enumerated with particularity in Article 3.

Assuming 36 U.S.C. § 2 is a grant of original federal jurisdiction to the Red Cross, it clearly is one of the "laws of the United States" within the meaning of 28 U.S.C. § 1331.

The federal removal statute permits removal of only two types of controversies: those that are founded on a federal question and those that involve citizens of different states. To the extent that status of the parties is relevant to the Red Cross, the only enumerated status applicable to it would be as a citizen of a different state, if it can be considered a citizen of any state. In the instant case, the District Court ruled that diversity jurisdiction was unavailable to the Red Cross, See Respondent's Brief in Opposition to Petition for a Writ of Certiorari, p. 5, thus the only remaining ground of federal jurisdiction is federal question jurisdiction under § 1331. In *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1989) the Court stated the matter even more succinctly:

Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. *Absent diversity*

of citizenship, federal-question jurisdiction is required.

(Emphasis added).

Since this "right" to invoke federal jurisdiction must be considered under § 1331 as a law of the United States, it is also subject to § 1331 limitations, as well as the limitations of the general removal statute, 28 U.S.C. § 1441 (a) and (b), including the well-pleaded complaint rule. *Moore's Federal Practice*, 0.160 [3-1]. In some instances it should be noted that Congress has created statutory exceptions to the well pleaded complaint rule,<sup>13</sup> but there is no specific removal statute in 36 U.S.C. which excuses the Red Cross from compliance with this requirement. Thus, the Red Cross is clearly subject to this rule under § 1331 and §§ 1441 (a) and (b).

Possibly sensing that this argument on § 1331 might fail, the Red Cross also argues that its right to a federal forum arises out of its status, which is implicated whenever suit is brought against it. Once this status is implicated, the Red Cross contends that it is entitled to a federal forum whether or not the claims are based on state or federal law. Reply Brief, Petition for Writ of Certiorari, p. 7. In keeping with its policy of saying as little as possible on this issue, the Red Cross does not elucidate the nature of this somewhat mystical status, nor does it cite any authority for this position.

The respondents concede that the well-pleaded complaint rule

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13. See e.g. 9 U.S.C. § 203-5; Foreign Arbitral Awards; Suits arising under the Convention "are deemed to arise under the laws of the United States, [and] may be removed by the defendant . . . and the ground for removal need not appear on the face of the complaint, but may be shown on the petition for removal."

does not bar a court from resorting to pleadings other than the complaint, such as the petition for removal, to determine the status of a defendant. See 14A Wright-Miller-Cooper, *Federal Practice and Procedure*, § 3722, p. 265. This exception is often invoked in cases where jurisdiction depends on whether a defendant is engaged in interstate commerce. See *Oglesby v. RCA Corp.*, 752 F.2d 272, 278 (7th Cir. 1985). Also, in a few cases, the courts have gone beyond a complaint to determine the status of a federally registered trademark. See *Ulickny v. General Electric Company*, 309 F. Supp. 437 (N.D. N.Y. 1970) and *La Chemise Lacoste v. Alligator Company*, 313 F. Supp. 915 (D. Del. 1970); but see *La Chemise Lacoste v. Alligator Co., Inc.*, 506 F.2d 339 (3rd Cir. 1974).

The Red Cross does not specify the nature of the status which it contends automatically qualifies it for federal jurisdiction, but it has litigated issues relating to its status in several lower court cases. First, in *C.H. v. American Red Cross*, *supra*, the Red Cross argued that it is a government controlled corporation, and therefore, under 28 U.S.C. § 1349, it was entitled to invoke federal jurisdiction. However, after carefully reviewing the status of the Red Cross, the Court in that case concluded that, although the Red Cross served a vital national interest and cooperated closely with the United States government, it functioned independently, and was in no way controlled by the Government. *Id.* at 1022.

Second, the Red Cross has claimed in several cases that it is an agent of the federal government within the meaning of 28 U.S.C. §§ 451 and 1442 (a) (1) and as such is entitled to invoke federal jurisdiction. Thus far, the lower courts have unanimously rejected this contention, because the Government does not exercise the requisite amount of control over the Red Cross to qualify it as an agent, and because § 1442 (a)(1) applies only to natural persons. See e.g. *C.H. v. American Red Cross*, 684 F. Supp. at 1023-1024; *Walton v. Howard University*, 683 F. Supp. at 830-832;

*Griffith v. American Red Cross*, 678 F. Supp. at 185-186; and *Roche v. American Red Cross*, 680 F. Supp. at 453-455.

Further the Red Cross has not averred a federal defense so as to support removal under § 1442 (a)(1). *See Mesa v. California*, 489 U.S. 121 (1989). Section 1442 (a)(1) cannot support the Red Cross' plea for removal.

Federal incorporation and federal agency are the only types of status which the Red Cross has claimed in the twenty odd cases it has litigated over its right to be in federal court. It may be that the ingenuity of counsel will give rise to some new type of status, such as the claim that it is a "federal instrumentality". However, this very limited status as a federal instrumentality, like federal agency and incorporation, cannot by itself serve as a basis for federal jurisdiction, without some statutory foundation such as 28 U.S.C. § 1349 or § 1442 (a)(1). To date, the Red Cross has not relied on or cited any other statute which would entitle it to federal jurisdiction.

In any event, it is time for the Red Cross to confront this issue, and explain, with something more than derogatory and conclusory assertions, why the well-pleaded complaint rule does not apply to it.

**CONCLUSION**

The Judgment of the First Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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*Attorneys for Respondents*

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**APPENDIX A — SENATE HEARING  
DATED FEBRUARY 25, 1947**

**HEARING  
BEFORE THE  
COMMITTEE ON FOREIGN RELATIONS  
EIGHTIETH CONGRESS  
FIRST SESSION**

**ON**

**S.591**

**A BILL TO AMEND THE ACT OF JANUARY 5, 1905,  
TO INCORPORATE THE AMERICAN  
NATIONAL RED CROSS**

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**February 25, 1947**

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**COMMITTEE ON FOREIGN RELATIONS**  
**ARTHUR H. VANDENBERG, Michigan, Chairman**

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ARTHUR CAPPER, Kansas  
TOM CONNALLY, Texas  
WALLACE H. WHITE, JR., Maine  
WALTER F. GEORGE, Georgia  
ALEXANDER WILEY, Wisconsin  
ROBERT F. WAGNER, New York  
H. ALEXANDER SMITH, New Jersey  
ELBERT D. THOMAS, Utah  
BOURKE B. HICKENLOOPER, Iowa  
ALBEN W. BARKLEY, Kentucky  
HENRY CABOT LODGE, JR., Massachusetts  
CARL A. HATCH, New Mexico

Francis O. Wilcox, Chief of Staff  
C.C. O'Day, Clerk

AMERICAN NATIONAL RED CROSS

TUESDAY, FEBRUARY 25, 1947

United States Senate,  
Committee on Foreign Relations,  
Washington, D.C.

The committee met at 10:30 o'clock, pursuant to call, in the committee room, the Capitol, Senator Arthur H. Vandenberg (chairman) presiding.

Present: Senators Vandenberg (chairman), Capper, White, Wiley, Hickenlooper, Lodge, Connally, George, Thomas of Utah, and Hatch.

The committee met to consider S. 591, a bill to amend the

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act of January 5, 1905, to incorporate the American National Red Cross.

(Bill omitted)

The CHAIRMAN. The committee will come to order. The record can be made for the benefit of the Senators who are not present.

The hearing this morning is on S. 591, introduced by Senator Connally and me at the request of the American National Red Cross. The bill involves certain proposed amendments to the charter of the Red Cross. I should like very much to complete the hearings this morning so that we can get on with the legislation ahead of the other matters which are going to press us very shortly.

Mr. Charles M. Spofford, counsel of the American National Red Cross, is in general charge of the presentation. Mr. Spofford, whom do you represent?

Mr. SPOFFORD. Senator Vandenberg and members of the committee, our first witness will be Mr. Roland Harriman.

The CHAIRMAN. Mr. Harriman, will you take a seat here at your convenience? Will you state first, Mr. Harriman, your name and address?

STATEMENT OF E. ROLAND HARRIMAN, CHAIRMAN  
ADVISORY COMMITTEE ON ORGANIZATION,  
AMERICAN NATIONAL RED CROSS, NEW YORK, N.Y.

Mr. HARRIMAN. My name is E. Roland Harriman, Arden, New York.

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Mr. CHAIRMAN. What is your position with the Red Cross?

Mr. HARRIMAN. I am chairman of the Red Cross committee appointed by Mr. O'Connor to study the organization of the Red Cross. In addition, I have been a member of the Red Cross for many years and have served as a volunteer manager of the North Atlantic area during two of the past war years.

The CHAIRMAN. Will you present your statement in your own way respecting this bill?

Mr. HARRIMAN. I will, sir, if I may.

I would like to express at this time Mr. Basil O'Connor's deep regret that he cannot personally appear today to present his statement in behalf of the bill, but he has a long-standing speaking engagement in Akron, Ohio, on behalf of the Red Cross fund, which starts on Saturday.

In order to outline to you the purposes of this legislation, which has its origin in the development of the Red Cross during the past 40 years, I will briefly sketch a few facts as to the history of the organization. This background is treated more fully in the report of the advisory committee, which I believe you have before you, or which is available for your examination.

The American Red Cross was chartered by Congress for the primary purpose of fulfilling the obligations of the United States under the Geneva Convention, sometimes known as the Red Cross Treaty, which was signed in 1864 by 20 nations and which was ratified by the United States in 1882. The present organization was created by an act of Congress approved January 5, 1905. That act of 1905, with only minor amendments, has constituted the charter of the Red Cross up to the present time.

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Under the 1905 charter, the Red Cross has over the past 40 years developed a broad range of activities which have been responsive to its obligations as the agency of the United States for fulfilling certain of the commitments under the Treaty of Geneva and to the expanding demands made upon the Red Cross during not only two World Wars but in its piecetime activities as well.

The scope of the activities of the Red Cross cannot be accurately measured, since the voluntary efforts of a large part of our population have gone into them, particularly during the war years. Some kind of measure may be furnished, however, by the fact that the American Red Cross received in contributions during the war years upward of \$750,000,000 from the American people for its programs. It is obvious that in development of its programs the organization of the Red Cross should have likewise expanded.

In 1905 there were no chapters or local units in existence. At the present time there are 3,745 chapters, each with a territorial jurisdiction covering usually one county. Through these chapters the Red Cross had in 1946 a membership of approximately 37,000,000 American men, women and children. The corporate form or organization for carrying out the extensive programs in recent years, and the linking together in the national organization of three thousand and seven hundred-odd chapters, is that laid down in the original act of 1905.

As was observed by Mr. O'Connor, the chairman, this last year, the Red Cross presented a picture of a 1946 engine on a 1905 chassis. The important thing, of course, is the engine. That is the activity and the great loyalty of the American people. But one should not neglect the chassis or the corporate structure, which gives the vehicle direction and keeps it on the road.



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In the light of this, Mr. O'Connor about a year ago appointed an advisory committee of 27 to study the structure of the organization of the American National Red Cross in the light of its tremendous growth and expansion in the last 40 years. This advisory committee included, first, representatives of the central committee, which is the present governing board of the organization; secondly, representatives of the board of incorporators, who are the successors of the original incorporators; third, representatives of the chapters, with broad geographical distribution; fourth, a strong group representing members of the Red Cross at large, including the presidents of two universities, representatives of women's organizations, of labor, and others. The personnel of the committee is listed in the report.

The committee held several full-day sessions in Washington during the spring of 1946, in which the whole field of the organization of the Red Cross was discussed. On July 11, 1946, I transmitted to the Chairman of the Red Cross the unanimous recommendations, 25 in number, of that committee. These recommendations were put before the central committee, and at its September meeting last fall they were adopted unanimously by the central committee, with a few minor changes which are indicated in the print of the report. The central committee, in approving the recommendations of the advisory committee, directed the Chairman to take appropriate action toward their implementation and at a later meeting in the fall adopted bylaw amendments responsive to the recommendations.

However, certainly the major recommendations require charter amendment, and it is these recommendations which have been embodied in the bill that is before your committee.

The principle change in the corporate structure which requires

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congressional action is the enlargement of the governing body of the Red Cross and a consequent change in the manner of its selection. The Red Cross at present is governed by a central committee of 18, of whom 6 are chosen by the board of incorporators, 6 are chosen by the chapters, and 6 are appointed by the President of the United States. Of the President's appointees, 1 is designated as chairman of the organization, and the other 5 are from the Department of State, War, Navy, Treasury, and Justice.

Under the proposed legislation, the governing board would be enlarged to 50, of whom 30 would be elected by the chapters, 8 will be appointed by the President of the United States, and 12 will be elected by the board of governors itself as members at large. The 12 members at large would represent the national interests which it is the function of the Red Cross to serve and with which close association is desirable but which might not be included in selections by the chapters.

As to the Presidential appointments, one would continue to be designated as principal officer of the Red Cross, and the remaining seven would be selected from the departments and agencies of the Federal Government, with the provision that at least one, and not more than three, shall be from the armed forces.

It will be apparent that a governing board of 50 will give increased representation to the chapters, both numerically and relatively. It will permit wider geographical distribution of the governing board and better representation from the small chapters than is possible with the present committee of 18. The Presidential appointments will be from departments and agencies whose activities tie in with the Red Cross.

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The election of all the governors representing the chapters will be by the chapter delegates at their national convention. The election of any governors by the board of incorporators will cease, and that board will be abolished.

There are a number of recommendations in the advisory committee report which relate to the organization of the chapters and their relationship to the national organization. Most of these can be covered in the Red Cross bylaws. The only points which need to be included in the charter are a provision specifically recognizing the chapter form of organization, which the 1905 charter does not, and a requirement that in the election of the governing boards of the chapters and the selection of delegates to the national convention, the chapters shall adhere to democratic principles of election, which will be spelled out in the bylaws. These principles, which will include rotation of officials, will, it is believed, serve to strengthen the Red Cross organization at its base.

I think the foregoing cover the principle points which are embodied in the proposed legislation. They are found in sections 5 and 6 of the bill. The other provisions of the bill are merely formalities.

I wish to emphasize that the present bill goes only to the corporate structure of the Red Cross and not to its programs and policies. It has been our strong feeling that with the modernization of the organization, questions of program and policy can be resolved within the organization when its new enlarged board of governors has taken office.

I believe that the modernization is timely and necessary. I was impressed with the seriousness of the consideration given,

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both by the advisory committee and by the central committee. I believe this bill, which seeks only to enact into law those provisions which cannot be made effective by corporate action of the Red Cross, is adequate. I believe I speak for all of the elements of the Red Cross when I say that completion of the program initiated by the advisory committee will do much to make the Red Cross a more effective instrumentality of service to the Nation in the coming years.

I therefore respectfully urge the favorable consideration by your committee to the end that Senate bill 591 may be speedily enacted into law.

The CHAIRMAN. As I understand your statement, Mr. Harriman, the only two fundamental changes envisioned by S. 591 are (1) the enlargement of the governing authority in order to expand the democracy of the Red Cross and make it more responsive to its general membership———

Mr. HARRIMAN. That is right, sir.

The CHAIRMAN. And (2), in the same spirit, to recognize the local chapters as official units and thus again emphasize the general common character of the institution. Is that correct?

Mr. HARRIMAN. That is right, sir.

The CHAIRMAN. And those are the only two changes in the fundamentals involved in S. 591.

Mr. HARRIMAN. Yes; they are the important points. There are one or two others which implement those two purposes, but they all tie into those.

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The CHAIRMAN. In what respect do they implement them?

Mr. HARRIMAN. In the provision that the chapters shall adhere to this democratic principle of election of their officers, the rotation of their officers, and so on.

The CHAIRMAN. Does the committee wish to ask any questions of the witness?

Senator WHITE. I would like to ask one question, if I may.

I noticed in section 2, which appears on page 2, that you are empowered to hold real and personal estate, I expect anywhere, and then there is the provision that you have the power to sue and to be sued in State or Federal courts within the jurisdiction of the United States. Why have you not in the legislation claimed the right to sue in a foreign jurisdiction. Is that intentional?

Mr. HARRIMAN. May I ask Mr. Spofford if he will reply to that question?

Mr. SPOFFORD. Senator, I do not believe that question has arisen. The only amendment in section 2 is to make it clear that suits can be maintained in Federal as well as State courts, which has not been clear. It is not intentionally limited.

Senator WHITE. Is there anywhere else in legislation or in your treaties authority conferred upon you to bring suit in a foreign court provided you have the sanction of the foreign government?

What occurred to me was that somebody might leave you a legacy in England or France, or where not, and it might come into controversy. I do not know; the question in my mind was

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why you should not have the affirmative authority under this legislation to sue in the foreign court, to establish a right as to the assumed legacy.

Mr. SPOFFORD. I think, sir, the answer may be that the desire was not to make any changes that were not required by the committee report and this question has never apparently arisen, so we did not attempt to change the limitation of the original charter. I think the point is very well taken, and it might well be liberalized.

Senator WHITE. It struck me, and I have just noticed this, that with the Red Cross functioning in pretty much every country of the world, a situation might arise where you might want to bring suit to establish some right somewhere in the world, and here, by our national legislation, you are limiting your right to sue to your State and Federal courts within our jurisdiction. I am just raising the question. I make no particular point of it.

The CHAIRMAN. As I understand the witness, this bill confines itself exclusively to procedural matters and does not change it basically at all. Is that correct?

Mr. HARRIMAN. That is right.

Senator CONNALLY. It would be a very simple matter to amend it to include State, Federal, and foreign courts. It is likely that they have that right now. Like any litigant, they would have a right probably to go into foreign courts, but I think the Senator from Maine is right in calling attention to it-that we should make perfectly clear what our intention is.

Senator WHITE. I think there might be the right accorded



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elsewhere to maintain suits in foreign countries. Of course, you would have to have the consent of the foreign country.

Senator CONNALLY. It is a corporate entity, and it would have the same rights any other corporation would have. But I think it is well to spell it out.

Senator WILEY. It is apparently limited by this language.

Senator GEORGE. Is not the Red Cross incorporated in other countries?

Mr. HARRIMAN. Not the American Red Cross; no, sir. Most of the other countries have their own Red Cross.

Senator GEORGE. They have a comparable organization?

Mr. HARRIMAN. Not directly. There is an International Red Cross of which all the various Red Crosses of the different countries are members.

Senator GEORGE. That is what I thought. I thought the international organization was spread all over the earth anyway, and you did not need any authority. I do not think we could give you any authority, Senator White, to the Red Cross or any other American corporation to go into any foreign court. That would depend upon treaty arrangements.

Senator WHITE. I agree with you. We could not confer the absolute right to go into a French court or a British court, but it seemed to me this almost denied us the right even if we had the consent of the foreign country.

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Senator HICKENLOOPER. Would there not be a question? Why would there not be a question raised as to whether or not the basic right of this corporation, under the law setting it up, gave them a right to sue?

Senator GEORGE. I do not think anything we could do would give them any right to sue in any foreign country. That would depend upon your treaty relationships with foreign countries, and they can give to any of our citizens the right to sue or be sued in their courts, under conditions, of course. They do, as a matter of fact.

Senator WHITE. A corporate body which we set up would have only the rights which we give it. We could not extend its authority into a foreign country, but we could clothe it with the authority here.

Senator CONNALLY. You could give it permission to sue.

Senator THOMAS of Utah. As I understand it, Senator White, he is telling us that the way this is worded we are putting a limitation upon the Red Cross which would make it impossible to sue.

Senator WHITE. That is what I am afraid of.

Senator THOMAS of Utah. As I read it, I think there is a limitation there, that it would probably interfere with some basic right you already have in the organization.

Senator HICKENLOOPER. You mean on the theory that if we give them one right, that establishes a limit beyond which they cannot go?

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Senator THOMAS of Utah. Yes, under the theory of limitation, that if you are given certain rights, you limit them to those rights. I think there is a danger in that, myself.

Senator GEORGE. I do not think there is any danger in it, because I do not think we can do anything at all about it. We have no jurisdiction in the premises whatsoever. We can only create the corporation here, and it becomes a citizen just like anybody else and is to be governed entirely by whatever treaty stipulations and arrangements are made with other countries. It has the power to sue and be sued here in our courts.

Senator THOMAS of Utah. Senator George, you do not think that this limitation here deprives them of the right of suing in a foreign court?

Senator GEORGE. No, sir, I do not think it does at all, but whether they can sue in a foreign court depends entirely upon what the foreign country says.

Senator HICKENLOOPER. On this theory — that a corporation is a creature of statute and has no inherent right; there is no such thing as a corporate right, a basic corporate right, except as a statute gives it to it. Therefore, under the corporate theory that there is a very strict construction and a strict limitation upon the rights, and they cannot go beyond the limitations of the rights set up by the statute, an individual has basic rights that are only curtailed by statute.

Senator GEORGE. You have no rights in a foreign court except what the country gives you.

Senator HICKENLOOPER. I think that is sound.

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Senator GEORGE. I think it would be rather ridiculous for us to put anything in here about the right of an American-created corporation to bring suit in a foreign country.

Senator WHITE. It strikes me this way: There is a vast difference between the rights of an individual and the right of a corporate body. That corporate body has only such rights, speaking very generally, as are expressly conferred upon it; and when you undertake to say that they may sue and be sued, but may sue only in the courts of the United States, State and Federal, within the jurisdiction of the United States, it seems to me you have put a limitation upon the complete freedom of that corporation to bring suit, even if the country which may be the location of the litigation gives you its blessing and tells you to go ahead. Still there is the question as to whether within your corporate form and within your corporate authority you have the right to maintain a suit in a foreign country.

Senator HATCH. May I ask a question, Mr. Chairman?

Senator White, your objection would be met, would it not, if you would merely strike out the words "within the jurisdiction of the United States"?

Senator WHITE. The words "State or Federal" seems to be also somewhat limiting. I think the way to cure it is just the way to put in an affirmative statement, "to sue or be sued in any foreign court or in the courts of the United States," or something of that sort.

Senator GEORGE. Would we want foreign countries to have the right to sue us?

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Senator CONNALLY. That is what I was going to suggest. You might not want to give foreign countries the right to sue us in their courts.

Senator GEORGE. I think the purpose of the bill is very clear, and that is to give the jurisdiction in State courts and Federal courts, and I think we had better leave it there.

Senator WHITE. I do not press the matter, Mr. Chairman.

The CHAIRMAN. I suggest that we leave the matter with Mr. Spofford, who is the general counsel of the Red Cross; and if, upon reflection, he wishes to subsequently suggest any language in this connection, we will be glad to take it on the floor when the bill comes up.

Senator CONNALLY. May I suggest there that all that we can do would be to give it permission to sue if, under the laws of the country where the suit is desired to be brought, or under a treaty, they have the right to do so. That is the only authority we have.

Senator GEORGE. I think it would occur to Mr. Spofford or any counsel who is connected with this thing that when once you go into a foreign court to sue, they can come back at you right there. There is not any doubt in the world about that, and I think you would want to determine whether or not you want to subject yourself to suits all around the world.

Senator CONNALLY. Senator George, may I ask you a question now? Suppose there were property of the Red Cross in a foreign country. It could sue the Red Cross now and attach the property in a proceeding in rem.

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Senator GEORGE. It probably could. It would depend upon the laws of the country. I should think that there is an organization that has been so closely identified with government and has been so much under the protection of the arm of our Government, with respect to any right that the Red Cross might have in any foreign country that the State Department would be quick to intervene, and perfectly willing to intervene, asserting its rights, trying to secure its rights.

I have no objection if you want to put something in there.

Senator WHITE. I just raised the question. I have said all I want to say.

Senator GEORGE. I have no idea that they would ever bring suits in a foreign country. They would go through the State Department.

Senator CONNALLY. If you strike out the language "State or Federal, within the jurisdiction of the United States," they would have a right to sue and be sued. Then it would depend upon the laws of the particular country. We just grant them the right to sue and be sued. You evidently inserted "State or Federal" so there would be no question as to which jurisdiction.

Senator GEORGE. There is no question but what the State court would entertain a suit, being a Federal corporation.

Mr. HICKENLOOPER. Could you reach this by merely saying that they shall have the same right to sue and be sued as that possessed by a natural person?

Senator GEORGE. They have already, Senator. Generally



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speaking, even our Supreme Court has held that.

Senator HICKENLOOPER. Then they do not need this provision proposed in this bill.

Senator CONNALLY. If you create a corporation, you have to give it the right to sue and be sued.

Senator HICKENLOOPER. I understood Senator George said they already have the right to, as a natural person, sue and be sued.

Senator GEORGE. I think there might be some question about the right of a Federal corporation to be sued in a State court. I thought that was, and I still think it is, the purpose of this provision.

The CHAIRMAN. I doubt whether we would wish to consider any amendment on this subject until it had had the study of the general counsel of the Red Cross himself.

Senator GEORGE. I agree with you.

The CHAIRMAN. And his recommendation.

Senator THOMAS. There is no doubt we are creating a Federal corporation here, are we?

Senator GEORGE. It has already been created.

Senator THOMAS. And it stays in that field?

The CHAIRMAN. On page 4, line 9, the word "develop"

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is a typographical error, is it not, and should be "devolved"?

Mr. SPOFFORD. Yes, sir.

Mr. HARRIMAN. Yes, sir.

The CHAIRMAN. Are there any other questions?

Thank you, Mr. Harriman.

Mr. Spofford, whom else would you like to present?

Mr. SPOFFORD. I would like to present Mr. Herbert Trix.

STATEMENT OF HERBERT TRIX, ADVISORY  
COMMITTEE ON ORGANIZATION, AMERICAN  
NATIONAL RED CROSS, DETROIT, MICH.

Mr. TRIX. My name is Herbert Trix, chairman of the Detroit Chapter of the American Red Cross, and have been for the last 2 years, and a member of the organization for a great many years.

I was a member of this advisory committee of which Mr. Harriman was chairman, that worked on the preparation of these recommended changes. I would like to speak on behalf of those changes from the standpoint of the chapters of the American Red Cross.

The Red Cross, as Mr. Harriman has said, has changed its character considerably from its incorporation in 1905 until now it is, as you know, spread all over the country, including some 3,700 chapters and considerably in excess of 20,000,000 members.

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The chief change in the charter which affects the chapters has to do with giving the chapters what amounts to a controlling influence in the governing body of the American Red Cross. We believe that is a helpful, constructive change. It will, of course, make the chapters realize as they cannot feel now that the Red Cross belongs to them, and not they belong to the Red Cross.

Senator CONNALLY. Will it not stimulate the activity of the members of the local chapters if they feel that they are having some voice and some kind of influence in the control of the national organization?

Mr. TRIX. Senator Connally, that, to my mind, is the strongest reason in favor of it, because, as we have found in all organizations, there is nothing that will so stimulate, as you say, a man's interest in an organization as to feel that he is part of it and he has something to say and do with its operation and management.

We have had the example in Detroit, where, included under the Detroit Chapter, are 21 branches that are in Allenville, Meltonville, Highland Park, Hamtramck, and River Rouge. We started several years ago including seven representatives of those chapters on our board of directors each year, rotating, so that once every 3 years there is a representative from every branch in the Detroit district, and it has had a very splendid effect in developing a more intense interest on the part of those branch chapters.

Senator CONNALLY. Under this bill they would be more than simply a collecting agency.

Mr. TRIX. That is correct.

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Senator CONNALLY. Now their chief activity is to go out and drum up money and sent it in to headquarters.

Mr. TRIX. Not entirely. For example, last June a tornado struck River Rouge, which is a suburb down below Detroit. It went through there in the course of a few minutes and caused quite a large destruction of property. There were no lives lost, although there were many cases requiring hospitalization. The Red Cross in Detroit and its branches went into action, and we worked through the River Rouge branch of the Red Cross. They were the organization that took charge. The national organization sent disaster relief men on by air, and they got there the next morning, and so a very splendid job was done in providing relief and assistance in that tornado, and the River Rouge Chapter was made the spearhead. We gave them the idea that it was their job, and the Detroit Chapter and the national organization were back of them to give them whatever help was necessary, but that it was their responsibility, and they took it splendidly.

From the standpoint of the chapters, and I have just discussed these changes with representatives of Chicago, St. Louis, Cincinnati, Cleveland, and Los Angeles Chapters, they all feel that the purposes of the bill are constructive and in the best interests of the organization, and on behalf of the chapters, best interests of the organization, and on behalf of the chapters, we respectfully request that it receive your favorable consideration.

The CHAIRMAN. You know of no opposition to these proposals that have arisen from any source?

Mr. TRIX. No, sir, Senator. I have heard nothing but approval and commendation.

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The CHAIRMAN. As a matter of fact, this is a response to a rather general feeling among the chapters that there ought to be a larger measure of chapter authority in connection with the national organization. Is that no true?

Mr. TRIX. That is correct. Many of the chapters had felt that they were not enough a part of the national organization, and they welcomed the opportunity to be more closely connected with it.

The CHAIRMAN. Are there any questions?

Thank you, Mr. Trix.

Senator HATCH. I want to ask the chairman of the Judiciary Committee a question. This question of Federal charter has been one that has long been considered by the Committee on the Judiciary, and I think last year we passed a bill, did we not, Senator Wiley?

Senator WILEY. Yes, sir. It is up again.

Senator HATCH. Did we not pass the bill, last time the Kilgore bill, requiring reports?\*

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\* The so-called "*Kilgore bill*" (which never became law) was intended to establish a congressional policy concerning the creation of private corporations by act of Congress. Relevant to Senator Hatch's discussion was section 7 of the bill which the drafters hoped would vest federal courts with jurisdiction over actions involving federal corporations.

Section 7 stated: "For purposes of court jurisdiction based upon diversity of citizenship a corporation created by or under an act of Congress shall be

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Senator WILEY. The bill passed the Senate, but it failed in the House. Now it is what you might call a Federal charter bill. It is now pending in Judiciary.

Senator HATCH. It did not pass the House? I thought by making this amendment to the charter they would be bringing themselves within the terms of that bill, which requires several things.

Senator WILEY. That bill is not law yet.

Mr. SPOFFORD. We considered the Kilgore bill, which was not adopted at the last session. We did not read that as applying to corporations already in existence.

Senator HATCH. I was just thinking that if you amend your charter now, if you do not come within that bill.

Mr. SPOFFORD. The bill is not yet law, and we approached this by way of amendment, and very limited amendments, rather than reincorporation or redrafting of the whole charter, with the

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(Cont'd)

deemed to be a citizen of Maryland, unless otherwise specified by act of Congress." As explained by Senator Kilgore in his report from the Committee on the Judiciary (June 11, 1946), the purpose of section 7 was "to remove confusion with respect to the citizenship of corporations chartered by the Congress, in cases where this question arises in connection with the determination of court jurisdiction based upon diversity of citizenship.

It is particularly significant to note the reason why Senator Kilgore thought this provision was important. In his June 11, 1946 Report, the Senator asserted: "As matters now stand, federally chartered corporations cannot sue or be sued in the district courts of the United States, as can corporations in the States."



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thought that that would make clear that we would not be under the law.

Senator HATCH. My thought is that if this amendment is adopted before such a bill as the Kilgore bill is passed, you would not come within its terms.

Mr. SPOFFORD. That would be my opinion.

The CHAIRMAN. Is there anything else? Does that conclude your presentation?

Mr. SPOFFORD. Yes, sir.

The CHAIRMAN. Very well. We will excuse our guests and visitors and go into executive session.

(Further hearing was in executive session.)

The CHAIRMAN. Gentlemen, I would like to pass on S. 591. The bill will be amended on page 4, line 9, by substituting the word "devolve" for the word "develop." Are there any further amendments?

Senator HATCH. It would not be in order to raise a question of jurisdiction, would it?

The CHAIRMAN. It would not do you the slightest good, because the Reorganization Act specifically spells out the fact that all legislation relating to the American Red Cross comes to the Foreign Relations Committee.

Senator HATCH. I am glad to know that. When I saw this

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bill and knew what a study the Committee on the Judiciary had made —

The CHAIRMAN. In the first instance, I automatically referred it to the Committee on the Judiciary on precisely the thought you had, until Mr. Watkins called my attention to it. I should have explained that to the Senate at the time. I think that is a fair question.

Senator CONNALLY. I make a motion that you report it, subject to the attorney's study.

The CHAIRMAN. If he wishes to present an amendment on this subject, we will consider it on the floor.

Those in favor say, "Aye." Those opposed, "No." The bill is passed.

(Whereupon, at 11:20 a.m., the hearing was adjourned.)

**APPENDIX B — SENATE REPORT NO. 38**

80th Congress  
1st Session

Senate

Report No. 38

**AMENDING THE ACT OF JANUARY 5, 1905, TO  
INCORPORATE THE AMERICAN NATIONAL RED CROSS**

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February 26 (legislative day, February 19), 1947.-Ordered to be printed

Mr. Vandenberg, from the Committee on Foreign Affairs, submitted the following

**REPORT**

(To accompany S.591)

The Committee on Foreign Relations which has had under consideration the bill (S. 591) to amend the act of January 5, 1905, to incorporate the American National Red Cross, report the bill favorably to the Senate without amendment and recommend that it do pass.

The purpose of this bill is to effect certain changes in the organization of the American National Red Cross which will result in giving it a more democratic base on which to operate and enabling it to function more effectively in the proper discharge of its duties.

The first Federal charter of the American Red Cross was obtained in 1900 and revised in 1905. The 1905 charter, with minor revisions, is the charter under which the Red Cross now functions. In view of the tremendous growth and expansion of the agency

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since that time, Mr. Basil O'Connor, chairman of the Red Cross, appointed an advisory committee of 27 members on March 4, 1946, to study its structure and organization and to make appropriate recommendations. As announced by Mr. O'Connor, the purpose of this committee was twofold:

First to make certain that all the American people who constitute the American National Red Cross have adequate representation in shaping the policies of the national organization; and second, to review the corporate structure of the American National Red Cross to insure the most effective handling of programs.

The present legislation incorporates, in the main, the recommendations of the advisory committee. Among other things, membership of the governing board is enlarged and the method of electing its members is made more democratic. The local chapters of the Red Cross are officially recognized as the local units of the corporation in the States and Territories of the United States and the importance of their role in the organization is augmented. The legislation is designed to reorganize the American National Red Cross as an administrative machine and does not involve any new international commitments for the United States.

On February 25, 1947, the Foreign Relations Committee heard witnesses on the bill representing both the national headquarters and the local chapters of the Red Cross. Since there seems to be no opposition to these proposals from any quarter the committee has no hesitation in recommending the bill to the Senate for its approval. (end of report)

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## SENATE SESSION

The bill (S. 591) to amend the act of January 5, 1905, to incorporate the American National Red Cross was announced as next in order.

The PRESIDENT pro tempore. Is there objection to present consideration to the bill?

Mr. TAFT. Mr. President, may we have an explanation of the bill?

The PRESIDENT pro tempore. If the Chair may be permitted to make a brief statement, the following is submitted by way of explanation: This measure changes the basis of incorporation of the American National Red Cross in only two particulars. In one particular, it increases the national governing body from 18 to 50, so as to broaden its democratic scope. In the other particular, it increases the authority of the local chapters of the American Red Cross, so as to enable them to exercise a substantially increased authority in the choice of the general management. Is there objection to the present consideration of the bill?

There being no objection, the bill (S. 591) was considered, ordered to be engrossed for a third reading, read the third time, and passed, as follows:

Note: (Text of S. 591 omitted)

**APPENDIX C — HOUSE REPORT NO. 337**

80th Congress

House of Representatives

Report No. 337

1st Session

**AMENDING THE ACT OF JANUARY 5, 1905, TO  
INCORPORATE THE AMERICAN NATIONAL RED CROSS**

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May 6, 1947.--Committed to the Committee of the Whole House  
on the State of the Union and ordered to be printed

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Mr. Vorys, from the Committee on Foreign Affairs, submitted  
the following report:

[To accompany S. 591]

The Committee on Foreign Affairs, to whom was referred the bill (S. 591) to amend the act of January 5, 1905, to incorporate the American National Red Cross, having considered the same, report favorably and unanimously thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

On page 3, line 13, insert a period after the word "treaties" and strike out "and under any other treaty or convention similiar in purpose to which the United States of America may hereafter adhere."



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On page 9, line 4, after "1905," insert "as amended,".

The bill amends a number of provisions of the act to incorporate the American National Red Cross, approved January 5, 1905, as amended by the act approved June 23, 1910.

In accordance with clause 2a of rule XIII of the Rules of the House of Representatives, the provisions of the act approved January 5, 1905, as amended, are included in this report (the new language in italics and the repealed sections within black brackets) as follows:

(Text of SB 591 omitted)

S. 591 was referred on April 18, 1947, to a special subcommittee appointed for its consideration, consisting of Mr. Vorys, of Ohio (chairman), Mrs. Bolton, of Ohio, and Mr. Kee, of West Virginia. After thorough study and consideration, the subcommittee recommended the adoption of the bill with two amendments, which were agreed to by the committee.

The first amendment deletes from section 2, page 3, starting on line 13, the words "and under any other treaty or convention similar in purpose to which the United States of America may hereafter adhere". The purpose of the amendment is to make it clear that in this bill the United States does not bind itself to operate only through the American National Red Cross in relief matters such as the relief program contemplated in House Joint Resolution 153, which passed the House April 30, 1947.

The American National Red Cross is primarily an organization to provide aid to the sick and wounded of armies in time of war and to provide disaster relief. It was the unanimous

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opinion of the subcommittee and of the full committee that the deletion of these words was necessary in order to prevent a misconception of the functions of the American National Red Cross that might possibly lead to misunderstandings in connection with relief programs which might be undertaken in the future by the United States Government.

The second amendment is to correct a drafting error by inserting the words "as amended," after "1905," on line 4 of page 9. This is made necessary because the "section 8" referred to does not appear in the original act approved January 5, 1905, but was added in the act of June 23, 1910, which amended the 1905 act.

Investigation by the subcommittee developed that the bill was drafted as the result of recommendations made by a special advisory committee of 27 members which had been appointed by the chairman of the American National Red Cross to make certain that all the American people who constitute the American National Red Cross have adequate representation in shaping the policies of the national organization; and second, to review the corporate structure of the American National Red Cross to insure the most effective handling of programs.

This advisory committee on organization, which was headed by Mr. E. Roland Harriman, as chairman, submitted a unanimous report to the chairman of the American National Red Cross, Mr. Basil O'Connor, on June 11, 1946, embodying the recommendations of the advisory committee for giving the organization a more democratic base on which to operate and to enable it to function more effectively in the proper discharge of its duties.

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S. 591 incorporates the recommendations of the advisory committee which require changes in the charter at this time. The American National Red Cross received its first Federal charter from the Congress in 1900. It was revised in 1905 and received further minor changes in 1910. Since receiving its original Federal charter, the American National Red Cross has had a phenomenal growth, both in membership and in the scope of its service to humanity. Originally, the American National Red Cross was planned to operate on the basis of "State and Territorial societies." Actually, however, the work of the Red Cross in peace or in war is essentially a national and community operation rather than a State operation, and the Red Cross has been firmly established on a chapter basis for over 25 years. Under the provisions of S. 591, the chapters are officially recognized as the local units of the corporation in the States and Territories of the United States and their functional importance in the organization is greatly increased.

The bill also reorganizes the governing body of the corporation along more democratic lines, increasing the number of its members for that purpose and broadening the method of their selection.

The immediate enactment of this proposed legislation has become a matter of urgency for the Red Cross. The enlarged Board of Governors provided for in the bill is to be elected by the annual national convention of the organization which will meet in Cleveland on June 9, 1947. To take care of certain technical details, such as presenting the nominees for the Board of Governors to the 3,700 odd chapters of the American National Red Cross, and preparation for the adoption of necessary rules and bylaws to implement the plan, which are contingent upon the adoption of this legislation, it is essential that the bill be finally approved by

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May 10, 1947. The committee therefore recommends the speedy enactment of S. 591 as a measure which will assist in modernizing the corporate structure of the Red Cross in the interests of democratic principles and efficiency.

No. 91-594

Supreme Court, U.S.  
FILED

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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E., RESPONDENTS

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On Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit

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**REPLY BRIEF FOR THE PETITIONER**

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# In the Supreme Court of the United States

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## REPLY BRIEF FOR THE PETITIONER

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“What is of paramount importance,” this Court has written, “is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.” *Finley v. United States*, 490 U.S. 545, 556 (1989). Our opening brief, and the Solicitor General’s amicus brief, present a clear interpretive rule that is amply supported by this Court’s decisions and suffices to decide this case: a federal charter provision that explicitly empowers an entity to sue and be sued in the federal courts is a grant of original federal jurisdiction. By contrast, respondents’ brief and that of the Association of Trial Lawyers of America (ATLA) make only one halfhearted stab at a clear interpretive rule (one that demands mention of a *particular* federal court) amidst a hodgepodge of arguments that would invite jurisdictional chaos.

The particular-federal-court rule fails because it is inconsistent with *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and with the reasoning of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Respondents' other arguments are similarly infirm.

1. *Case law.* Respondents and ATLA largely repeat the First Circuit's reading of this Court's cases. We showed that reading to be erroneous in our opening brief, and nothing that respondents or ATLA have said improves on it.

Respondents and their amicus insist that the dispositive features in *Osborn* were that the Bank charter mentioned a *particular* federal court, i.e., the circuit courts (Resp. Br. 6-17; ATLA Br. 3-6), and that the Bank charter referred to state courts "of competent jurisdiction" rather than treating state and federal courts in a "parallel" fashion (Resp. Br. 14-17; ATLA Br. 7-9). Respondents also insist (Br. 11) that only unambiguous charter language will support federal jurisdiction. But, as we demonstrated in our opening brief (at 16-26), this Court ascribed no significance whatever to the features respondents would use to distinguish *Osborn*, and those features were lacking from the provision that, according to this Court, supported federal jurisdiction in *D'Oench*. Likewise, no presumption against jurisdiction exists in this context, and any such presumption would be overcome by the clear words of the Red Cross charter.

a. Respondents and ATLA misread the decisions of this Court that have declined to interpret sue-and-be-sued clauses containing general references to courts as creating federal jurisdiction. The "generality" that militated against federal jurisdiction in

*Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), and in *Bankers Trust Co. v. Texas & Pacific Railway*, 241 U.S. 295 (1916), was the charters' failure to refer to the federal courts at all in the sue-and-be-sued clause, *not* their failure to specify a *particular* federal court. The Court underscored this point in *Osborn* by stressing that the *Deveaux* charter did not create federal jurisdiction because it failed to "mention[] the courts of the Union" (22 U.S. (9 Wheat.) at 818) (emphasis added), whereas the bank charter in *Osborn* did create jurisdiction because it "enabl[ed] the Bank to sue in the Courts of the United States" (*id.* at 828).

The decision in *D'Oench* confirms that reference to a particular federal court is not necessary to create federal jurisdiction. There, the Court ruled that a sue-and-be-sued clause that authorized suit "in any court of law or equity, State or Federal," but that did not identify a particular federal court, was a grant of original federal jurisdiction. 315 U.S. at 455. Although the charter "further provide[d]" that actions in which the FDIC is a party were deemed to arise under federal law (*id.* at 455 n.2), the contexts in which the Court quoted the sue-and-be-sued clause and the "arising under" provision make it unmistakable that this Court thought that the former conferred jurisdiction.

Respondents and ATLA try to avoid *D'Oench* by asserting, as did the First Circuit, that this Court *should have* relied on the "arising under" provision to the exclusion of the sue-and-be-sued clause in finding jurisdiction. But that assertion, and the accompanying discussions of the legislative history of the FDIC charter (Resp. Br. 20-22; ATLA Br. 10-11; Pet.

App. 10a-11a & n.5), amount to nothing more than a challenge to this Court's observation in *D'Oench* that jurisdiction rested on the sue-and-be-sued clause. The views of the handful of legislators or staffers who had input into the Senate Report accompanying the Banking Act of 1935, who apparently failed to appreciate that there already was federal jurisdiction over all FDIC cases, are hardly compelling evidence that this Court was wrong. Even if the Court *was* mistaken, however, this much is clear: in the immediate aftermath of *D'Oench*, Congress was entitled to assume that a sue-and-be-sued clause worded exactly like the FDIC's conferred federal jurisdiction, because this Court had said so.<sup>1</sup> And it was in the immediate aftermath of *D'Oench* that Congress amended the Red Cross sue-and-be-sued clause so that, in pertinent part, it *did* read exactly like the FDIC clause.

Respondents and ATLA misunderstand our point when they say (Resp. Br. 19; ATLA Br. 10-11 &

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<sup>1</sup> In *Molzof v. United States*, 112 S. Ct. 711 (1992), this Court recently reaffirmed the proposition that Congress may rely on the settled meaning of terms with a history of judicial interpretation:

“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word \* \* \*.”

*Id.* at 716 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); see also *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (“Where Congress uses terms that have accumulated settled meaning \* \* \* a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947), quoted in *Moskal v. United States*, 111 S. Ct. 461, 472 (1990) (Scalia, J., dissenting).



n.4) that we have dismissed the “deemed to arise under” language in the FDIC charter on the ground that the *D’Oench* Court “relegated [it] to a lowly footnote.” The reason the “arise under” language cannot be regarded as the basis for federal jurisdiction in *D’Oench* is that the Court cited it solely as something the FDIC Act “further provides,” as opposed to the sue-and-be-sued clause that the Court cited immediately after stating that federal jurisdiction was not based on diversity. 315 U.S. at 455 & n.2. Only a purposeful reading of *D’Oench*, not a neutral and fair one, could lead to the conclusion that the Court chose such a strange way to say that jurisdiction was based on the “arising under” clause and not the sue-and-be-sued clause.

b. Respondents also attempt (Br. 16-17) to distinguish the Red Cross charter from the bank charter in *Osborn* on the ground that the phrase “of competent jurisdiction” appears in the portion of the bank charter dealing with state courts, but is absent in the corresponding section of the Red Cross charter. This distinction, however, cannot bear the weight respondents place on it.

First, as detailed in our opening brief (Pet. Br. 23-26), the *Osborn* Court placed no significance whatever on the fact that the bank charter’s references to state and federal courts were not “parallel.” Indeed, the distinction that respondents now claim to be crucial was not even addressed to, let alone endorsed by, the *Osborn* court.

Second, the sue-and-be-sued clause in *D’Oench* treated state and federal courts in exactly parallel fashion (suit permitted “in any court of law or equity, State or Federal”), yet that did not prevent

this Court from ruling that the clause conferred federal jurisdiction. *D'Oench* thus reaffirms what *Osborn* demonstrates: a reference to the federal courts in a sue-and-be-sued clause is a grant of federal jurisdiction; nothing more is necessary.

c. Also inaccurate is respondents' assertion (Br. 9-11) that the *Bankers Trust* decision, insofar as it construed the sue-and-be-sued clause, "rested at least in part" on legislation (Act of Jan. 28, 1915) that denied federal jurisdiction based solely on the fact of federal incorporation. The *Bankers Trust* Court rejected three asserted bases of federal jurisdiction in three numbered segments of its opinion. Segment 1 (241 U.S. at 303-305) rejected as a basis of jurisdiction the sue-and-be-sued clause, which did not mention the federal courts, solely on the authority of *Deveaux*. The Court made no mention of the 1915 legislation. Segment 2 (*id.* at 305-309) rejected the argument that "the bill shows that the suit is one arising under the laws of the United States apart from the incorporation of the Texas and Pacific Railway Company under acts of Congress" (*id.* at 303). It is in that segment of the opinion—having absolutely nothing to do with interpretation of a sue-and-be-sued clause—that the 1915 legislation was discussed. Segment 3 (*id.* at 309-310) rejected an assertion of diversity jurisdiction and is irrelevant for present purposes. To divine from the Court's carefully compartmentalized reasoning in *Bankers Trust* a sort of penumbral relevance of 28 U.S.C. § 1349 and like statutes to the interpretation of sue-and-be-sued clauses, as the First Circuit did (Pet. App. 8a), is sloppy reasoning at best.

Respondents and their amicus (Resp. Br. 11-12; ATLA Br. 7, 9-10) embrace the proposition, pro-

pounded by the First Circuit based solely on its gestalt reading of *Bankers Trust* (Pet. App. 8a-9a), that statutes are presumed not to create federal jurisdiction. Nothing that respondents cite supports any such presumption, nor has such a presumption ever played a role in this Court's decisions construing sue-and-be-sued clauses.<sup>2</sup> Nor is the language that confers federal jurisdiction in Red Cross cases ambiguous; to the contrary, at the time the Red Cross charter was amended, reference to the federal courts in a sue-and-be-sued clause was understood to create original federal jurisdiction. See Pet. Br. 27-30.

2. *Legislative history.* The legislative history supports our position, not respondents'. ATLA (Br. 13), unlike respondents (Br. 22), acknowledges that the words chosen by Congress are the best indication of congressional intent. For the reasons already given, analysis of those words establishes that the Red Cross charter confers jurisdiction on federal courts. To avoid this conclusion, respondents (Br. 23) contest

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<sup>2</sup> Respondents seek to bolster the First Circuit's erroneous reading of *Bankers Trust* by contending (Br. 5-6, 12, 22) that the Red Cross bears a "burden of proof" to justify removal from state to federal court. The party seeking to justify removal bears a "burden of proof" only in the sense that it must show the factual predicates for federal jurisdiction such as diversity of citizenship (*Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 96-99 (1921)) or the requisite jurisdictional amount. This "burden" has no application to disputed legal principles. See 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.168[4.-1], at 646 (1990); see also 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3739, at 574 n.6 (1985) (collecting cases). In the present case, there are no factual predicates to contest. Whether the Red Cross charter creates original federal jurisdiction is purely a question of law.

the proposition that Congress can rely on this Court's interpretations of legal terms, and assert that events *after* enactment are better guides to congressional intent. Neither argument can prevail.

a. This Court has held repeatedly that Congress is presumed to adopt the settled meanings of the words it employs in legislation. See note 1, *supra*; Pet. Br. 27-29. This "cardinal rule of statutory construction" (*Molzof*, 112 S. Ct. at 716) contradicts respondents' unwarranted assumption (Br. 23) that Congress was ignorant of *Osborn* and *D'Oench* when it amended the Red Cross charter.

Respondents also denigrate the "so-called Harriman Report" (Br. 22) as "ambiguous at best" (Br. 24), and suggest that the 1947 amendment sought merely to clarify the Red Cross's *capacity* to be sued in state and federal courts. To the contrary, Recommendation 22 stated expressly that, "in view of the limited nature of the *jurisdiction* of the Federal Courts, it seems desirable that this *right* be clearly stated in the charter." Harriman Committee Report 35, 36, Pet. Br. App. 3a, 4a (emphasis added).<sup>3</sup> Respondents are at a loss to explain how the limited nature of the jurisdiction of the federal courts can have any bearing on an entity's capacity to be sued in them. In addition, the 1905 charter already gave the Red Cross the express right "to sue and be sued in courts of law and

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<sup>3</sup> ATLA, without ellipsis, quotes this passage but excises the words "the jurisdiction of." ATLA Br. 15. ATLA also doubts that Congress adopted the Harriman Committee's intentions (*id.* at 14), but the Harriman Committee's recommendations were the acknowledged basis of Congress's 1947 amendments to the Red Cross charter. S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947).

equity" (Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600); both state and federal courts are "courts of law and equity," so clarification of the capacity for suit was clearly unnecessary. At bottom, respondents assert that the added words "State or Federal" in the Red Cross charter have no meaning at all. That position cannot be correct. See *Moskal v. United States*, 111 S. Ct. 461, 466 (1990) (noting the "established principle that a court should 'give effect, if possible, to every clause and word of a statute'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

Respondents' and amicus's observation (Resp. Br. 26-27; ATLA Br. 15-16) that Congress had many concerns other than jurisdiction when it amended the Red Cross charter in 1947 is entirely beside the point. Naturally there are references to "corporate structure" in the legislative history—most of the proposed changes pertained to the Red Cross's organizational structure. But to infer from this that the amendment specifically addressing jurisdiction must therefore be construed as importing mere corporate capacity is, to borrow Chief Justice Marshall's phrase, "surely a conclusion which the premises do not warrant." *Osborn*, 22 U.S. (9 Wheat.) at 818.<sup>4</sup>

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<sup>4</sup> Respondents mention in passing that the Red Cross's sue-and-be-sued clause appears "in the context of an enumeration of corporate powers such as the capacity to hold real and personal property, to accept gifts and devises, to adopt a seal and other emblems, to sue and be sued, and to do other similar acts." Resp. Br. 13. The placement of the clause amid other, more mundane grants of corporate power cannot detract from its force as a grant of jurisdiction, for the clauses at issue in *Osborn* and *D'Oench* kept equally undistinguished company. See Act of April 10, 1816, ch. 44, § 7, 3 Stat. 269; Banking Act of 1933, ch. 89, § 8, 48 Stat. 172; see also *Osborn*, 22 U.S. (9 Wheat.) at 876-879 (Johnson, J., dissenting).



b. Respondents echo the First Circuit's reliance on negative inferences from extraneous sources to support their position. In particular, respondents argue (Br. 27-29) that subsequent congressional enactments in completely different areas should be used to introduce ambiguity into previously enacted statutes like the Red-Cross charter. We have already rebutted that contention (see Pet. Br. 39-44), and it is unnecessary to repeat those arguments here. It bears note, however, that respondents' proposed method would throw all statutory construction into chaos. Settled constructions of existing statutes would forever be at the mercy of lawyers who seek to reinterpret them "in light of" subsequent statutes that address completely different subjects.<sup>5</sup> Yet just last month this Court reaffirmed that the correct approach to statutory construction is to determine the meaning words had *at the time Congress chose to employ them*. *Molzof*, 112

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<sup>5</sup> This Court's decision in *United States v. Hutcheson*, 312 U.S. 219, 236 (1940), which respondents cite (Br. 28), in no way supports their position. In *Hutcheson*, subsequent legislation (the Norris-LaGuardia Act) threw light on an earlier statute (the Clayton Act) because the Court determined that it was specifically intended to disapprove two decisions of this Court interpreting the Clayton Act. Respondents' reliance (Br. 28) on *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945), also is unavailing. In *Alcoa*, the court did not cite later statutes, as the First Circuit did here, in order to show that language Congress used in an earlier statute was inadequate to accomplish its purpose. Quite the contrary, the *Alcoa* court cited the purposes of later statutes (not their language) solely to show "[t]hat Congress is still of the same mind" as it was when it passed the Sherman Act. A similar approach here would, if anything, lead to the conclusion that Congress in 1947-1948 had a general purpose to centralize actions against government agencies and instrumentalities in the federal courts.



S. Ct. at 716; see also U.S. Br. 14-15. From this perspective, the reference to federal courts in the Red Cross charter did in fact create original federal jurisdiction.

3. "*Policy considerations.*" We demonstrated in our opening brief that this Court's cases set out an interpretive rule that is dispositive in the Red Cross's favor (Pet. Br. 14-26), and that the legislative history of the Red Cross charter lends further support to our position if any is needed (Pet. Br. 37-45). However, because courts sometimes wonder why Congress would have wished to reach a particular result, we also included in our brief (at 26-36) a section discussing the reasons why *Osborn* should not be narrowed and the reasons why federal jurisdiction over the Red Cross makes sense. We concluded that, "of course, the foregoing concerns are relevant only insofar as they bear on the proper outcome as a matter of *statutory construction.*" Pet. Br. 36 (emphasis in original).

Nevertheless, we find ourselves accused of inviting judicial legislation (ATLA Br. 2-3, 12, 17-18, 19) and confronted with an array of competing "policy considerations" (Resp. Br. 33-38). We reiterate that we do not ask this Court to make policy, only to give its cases and (if appropriate) the legislative history the balanced reading that the First Circuit did not give them. See Pet. Br. 16, 45. The considerations that we discussed in our opening brief, however, remain valid, and respondents' contrary "policy considerations" should not carry the day.

Respondents cite a consistent congressional policy of "limiting federal jurisdiction (except for government owned corporations and agencies) to those situa-

tions where the controlling law is federal.” Resp. Br. 33. Such a perceived policy is not enlightening. The Red Cross, as a government instrumentality (*Department of Employment v. United States*, 385 U.S. 355, 360 (1966)), indeed an “agency of the Government of the United States” for some purposes (Harriman Committee Report 20, Pet. Br. App. 2a), is no ordinary litigant.<sup>6</sup> There is no reason to believe that Congress subjected it to jurisdictional “policies” that govern ordinary litigants rather than those applicable to governmental entities. Respondents invoke the proverbial “floodgate” scenario, warning that the federal courts will soon be buried by pedestrian state-law claims that the Red Cross, for sinister motives, will remove from state courts. Resp. Br. 34-35; see also ATLA Br. 18-19. But that scenario no more justifies a narrow reading of the Red Cross charter than it would justify a narrow reading of any provision (such as 28 U.S.C. § 1332 or the Federal Tort Claims Act or the Racketeer Influenced and Corrupt Organizations Act) that would force the federal courts to deal with state law. In any event, the prospect of opened floodgates is far more theoretical than real. As noted before (Pet. Br. 36 n.8), and as actual experience shows, the Red Cross’s policy is to remove only those suits that implicate some significant interest of the national organization.

Respondents also assert (Br. 35-36) that a decision favoring federal jurisdiction will force plaintiffs to pursue concurrent cases in state and federal courts. But, as we noted in our opening brief (at 35 n.6), 28 U.S.C. § 1367(a) provides for pendent-party juris-

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<sup>6</sup> In response to this point, respondents make (Br. 36) the same arguments that failed to convince this Court in the *Department of Employment* case.

diction to the fullest extent permitted by Article III of the Constitution. And contrary to respondents' claim (Br. 35), that statute has been interpreted in dozens of cases and has been accorded a liberal interpretation. See, e.g., *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991); *Jones v. Village of Villa Park*, 1992 U.S. Dist. LEXIS 736 (N.D. Ill. Jan. 28, 1992) (maintaining pendent-party jurisdiction over party where sole federal claim against that party was dismissed); *Garcia v. City of Chicago*, 1991 U.S. Dist. LEXIS 18966 (N.D. Ill. Dec. 23, 1991) (same); *Estate of Bruce v. City of Middletown*, 1992 U.S. Dist. LEXIS 379 (S.D.N.Y. Jan. 8, 1992) (exercising pendent-party jurisdiction). Thus, where causes of action against multiple defendants constitute a single "case," Section 1367 enables federal courts to exercise jurisdiction over the pendent state-law parties. There is no compelling argument for joining all the parties together in one forum, state or federal, when this bare minimum constitutional requirement is not met.

Finally, ATLA asserts (Br. 18-19) that it is important, indeed demanded by respect for the state courts, to entrust state-law issues to the state systems. The fact of the matter is, issues of *both* state *and* federal law are bound to arise in cases such as this one, and there is no single, inherent, "right" answer to the question whether such cases should proceed in federal or state court, since both systems surely *are* capable of resolving both types of issues at least passably well.<sup>7</sup> But Congress has decided that

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<sup>7</sup> Respondents are wrong, however, to suggest that, just because there is no "assurance of uniformity when federal courts address Red Cross issues" (Resp. Br. 37) (emphasis added)), entrusting those issues to the federal courts will not *promote* uniformity of decisions. If entrusting particular

certain categories of important cases deserve “the protection of a federal forum” even though they raise issues of state law: *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). One must either ignore *D’Oench* and read *Osborn* as a lawless decision premised solely on solicitude for the Bank of the United States rather than the sue-and-be-sued clause on which it purported to rest, or else concede that Congress has identified actions by or against at least *some* federally chartered entities as one such category. Once that much is conceded, it becomes easy to conclude—indeed, even the First Circuit concluded (Pet. App. 15a-16a)—that the Red Cross logically is one of the entities that Congress would have wanted to be able to litigate all cases in federal court.

4. *Constitutional concerns.* Respondents’ constitutional argument (Br. 30-33) rests on an apparent misunderstanding of the difference between statutory and constitutional “arising under” jurisdiction. This leads respondents to the ambitious suggestion (Br. 32) that this Court should overrule *Osborn*’s constitutional holding in order to create a constitutional doubt that in turn would call for a narrow interpretation of the Red Cross charter.

Contrary to respondents’ apparent belief, the Red Cross need not rely on *statutory* “arising under” jurisdiction under 28 U.S.C. § 1331, because its charter constitutes an *independent statutory grant* of federal jurisdiction that is not dependent on Section 1331. At the same time, however, it is crystal clear that this case does “aris[e] under \* \* \* the Laws of the

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issues to the federal courts did not promote uniformity at all, there would be little reason *ever* to provide for federal jurisdiction except in diversity cases.

United States" within the meaning of Article III, Section 2, Clause 1, of the Constitution. "Art. III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331, and \* \* \* heavy reliance on decisions construing that statute [i]s misplaced." *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983). In particular, constitutional "arising under" jurisdiction is broader than statutory "arising under" jurisdiction because "[t]he controlling decision on the scope of Art. III 'arising under' jurisdiction is Chief Justice Marshall's opinion for the Court in *Osborn v. Bank of the United States*" (*Verlinden*, 461 U.S. at 492; see also *id.* at 497), and *Osborn* addresses the precise constitutional question that respondents regard as doubtful. See also *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824) (upholding Bank's right, because of its charter, to sue in federal court to recover on promissory note); P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 983 (3d ed. 1988) [hereinafter *Hart and Wechsler*].

*Osborn's* constitutional holding is no sport. Because "a corporation has no powers and can incur no obligations except as authorized by federal law" (*Puerto Rico v. Russell & Co.*, 288 U.S. 476, 485 (1933)), a federal question is raised (even if it is easily decided) every time a federally chartered corporation is sued, and that fact suffices to satisfy Article III, leaving only the question whether Congress has in fact exercised the power to confer federal jurisdiction. Accord *Bankers Trust*, 241 U.S. at 305-309.\* Thus, this Court's decision in the *Pacific Rail-*

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\* Suits against corporations that owe their very existence and amenability to suit to the federal government thus are



*road Removal Cases*, 115 U.S. 1 (1885), although legislatively overruled years before this Court decided *Puerto Rico v. Russell*, remained valid authority for, and was cited for, the constitutional proposition just quoted. On other occasions when this Court has found *statutory* jurisdiction lacking, it has been careful to repeat *Osborn's* constitutional holding. "As long ago as *Osborn v. Bank of the United States*, *supra*, it was settled that a suit by or against a corporation chartered by an act of Congress is one arising under a law of the United States." *Bankers Trust*, 241 U.S. at 305. "[T]he doctrine of the charter cases [i]s to be treated as exceptional, though within their special field there [i]s no thought to disturb them." *Gully v. First National Bank*, 299 U.S. 109, 114 (1936).

Possible implications of *Osborn's* reasoning *outside* the realm of suits by and against federally chartered corporations, particularly its implication that there may be such a thing as "protective jurisdiction," have indeed been questioned. See, *e.g.*, *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting); *Hart and Wechsler* 983-984. But no source that respondents cite questions *Osborn's* holding that Congress has the constitutional power to grant federal courts jurisdiction over all cases by and against federally chartered entities.

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easily distinguished from suits against individuals (even if they are employed by the federal government). Accordingly, *Osborn's* constitutional holding is not called into the slightest doubt by *Mesa v. California*, 489 U.S. 121, 136-137 (1989). *Mesa* does not cite *Osborn* but relies on *Verlinden*, which reaffirmed *Osborn's* status as "[t]he controlling decision on the scope of Art. III 'arising under' jurisdiction" (461 U.S. at 492).



That proposition is as settled as a constitutional proposition can be.

5. *The well-pleaded complaint rule.* Finally, respondents argue (Br. 38-46) that the well-pleaded complaint doctrine is relevant to this case. As we explained in the reply brief at the certiorari stage (at 6-7), that doctrine is an interpretation of 28 U.S.C. § 1331 (statutory “arising under” jurisdiction), which concededly does not apply to this action based on state law. The doctrine operates to deny federal jurisdiction under Section 1331 based on anticipated or actual defenses or counterclaims. 14A C. Wright, A. Miller & E. Cooper, *supra*, § 3722, at 257-260 (1985). It has no relevance to cases in which federal jurisdiction is conferred by a different statute such as 36 U.S.C. § 2. Cf. *Planters’ Bank*, 22 U.S. (9 Wheat.) at 909 (“[T]he bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred by its charter. It does not sue, because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States.”).

Respondents’ contrary view (Br. 42) that “§ 1331 is fully applicable to any right of the Red Cross to invoke federal jurisdiction based on 36 U.S.C. § 2” simply reflects their continued failure to distinguish carefully between constitutional and statutory “arising under” jurisdiction. Constitutional “arising under” jurisdiction of course is applicable here, as noted above. Section 1331 (statutory “arising under” jurisdiction), on the other hand, is but one of many statutes conferring federal jurisdiction, and not the

one invoked by the Red Cross as the basis for removal here.<sup>9</sup>

If this Court rejects our view of 36 U.S.C. § 2, it will affirm the judgment below. If this Court agrees with us, however, that 36 U.S.C. § 2 confers original federal jurisdiction over all Red Cross cases, then the only fact necessary to bring this case within the relevant jurisdictional statute—the fact that the Red Cross is a party—will indeed be evident from the face of the well-pleaded complaint. Thus, even if it had merit, respondents' suggestion to import the well-pleaded complaint rule from Section 1331 into 36 U.S.C. § 2 would not alter the outcome of this case.

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<sup>9</sup> Respondents discuss at some length (Br. 44-46) the "status" of the Red Cross, apparently based on a misunderstanding of the statement in our reply brief at the certiorari stage (at 7) that "the Red Cross's right to a federal forum is based on its *status*." All we meant by that statement was that 36 U.S.C. § 2 confers on the Red Cross, just as certain other statutes confer on certain other federal entities, the right to sue and be sued in federal court, so that federal jurisdiction depends on who the party is and not what questions are raised. We do not, as respondents seem to think (Resp. Br. 12-13, 46), rely on 28 U.S.C. § 1349 or § 1442 as a basis for federal jurisdiction in this case, any more than we rely on Section 1331. We rely squarely and solely on 36 U.S.C. § 2.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1991

AMERICAN NATIONAL RED CROSS,

*Petitioner,*

- v. -

S.G. and A.E.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE  
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No. 91-594

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1991

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AMERICAN NATIONAL RED CROSS,  
*Petitioner,*

v.

S.G. and A.E.,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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BRIEF OF AMICUS CURIAE  
ASSOCIATION OF TRIAL LAWYERS OF AMERICA  
IN SUPPORT OF RESPONDENTS

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**IDENTITY AND INTEREST OF AMICUS CURIAE**

The Association of Trial Lawyers of America ["ATLA"] is a national voluntary bar association whose approximately 65,000 members primarily represent those who have suffered personal injury, deprivation of civil rights, or economic harm as a result of tortious misconduct. Tort law has traditionally been state law, primarily administered by state courts. For this reason, ATLA views the position urged

upon this Court by the American National Red Cross ["Red Cross"] as an unwarranted usurpation of state court power and a serious erosion of the role of state courts in presiding over causes of action principally involving questions of state law.

The parties' letters of consent to the filing of this brief have been filed with the Clerk of this Court.

### SUMMARY OF ARGUMENT

The corporate charter of the Red Cross, 36 U.S.C. §2, permits the Red Cross "to sue and be sued in courts of law and equity, State or Federal . . . ." The court below determined that this language does "not create original federal jurisdiction over all suits involving the Red Cross." *S.G. v. American National Red Cross*, 918 F.2d 1494, 1495 (1st Cir. 1991). The court correctly concluded that there is no "talismanic significance" to the mere inclusion of the word "federal" in the charter and instead properly focused on the meaning of the charter as a whole. *Id.* at 1497.

The First Circuit held that the charter language represents a simple grant of capacity to sue in the state or federal courts -- not a grant of federal jurisdiction. This conclusion is amply supported by this Court's precedents and the intent of Congress in enacting 36 U.S.C. §2.

The position advanced by the Red Cross is that there are "good reasons to afford the Red Cross a federal forum in all cases." Pet. Br. at 32. Whether Congress *should* have granted federal jurisdiction is not relevant. The issue before this Court is simply to determine what the legislature has in fact done. In the absence of any evidence that Congress intended



to create jurisdiction, the First Circuit properly refused to legislate in Congress' place.

## ARGUMENT

### I. THE RED CROSS CHARTER DOES NOT CONFER ORIGINAL FEDERAL QUESTION JURISDICTION OVER ALL CASES INVOLVING THE RED CROSS.

The Red Cross corporate charter at issue in this case states in relevant part:

[section] 2 *Name of Corporation; powers*

The name of the corporation shall be "the American National Red Cross" and by that name it shall have perpetual succession, *with the power to sue and be sued in courts of law and equity, state or federal, within the jurisdiction of the United States; . . .*

36 U.S.C. §2 (1988)(emphasis added). The Red Cross asserts that the mere inclusion of the word "federal" in its (or any other) congressional corporate charter confers exceptional or privileged jurisdiction in the federal courts. Pet. Br. at 14, 23. The Red Cross relies primarily on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

After an exhaustive review of this Court's precedents, including *Osborn*, and following an thorough analysis of congressional intent behind such charters, the First Circuit rejected the Red Cross' expansive view of *Osborn*. The court stated that neither *Osborn* nor its progeny "confer talismanic significance on a simple reference to federal courts in a

congressional charter." 938 F.2d at 1497. Instead, the First Circuit recognized that when Congress endows a corporation with the right to invoke federal jurisdiction, it commonly uses "clear and specific language." *Id.* at 1500. Amicus submits that the court below properly rejected the Red Cross' "expansive view of federal jurisdiction," and correctly held that the Red Cross charter failed to meet the minimal requirements set forth in *Osborn* for establishing federal question jurisdiction. *Id.* at 1499.

#### **A. Congressional Grants of Jurisdiction May Not Be Implied From General Sue-And-Be-Sued Clauses.**

Generally a corporate charter which confers the right to sue and be sued creates only the capacity to litigate. Fed. R. Civ. P. 17(b). This rule also applies to corporations chartered by Congress. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); *Bankers Trust v. Texas and Pacific Ry. Co.*, 241 U.S. 295, 305 (1916). Congressional charters, however, may also confer original jurisdiction over all cases involving the corporation. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817 (1824); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 454 (1942).

This Court has made it clear that jurisdictional grants must be specific, since general language results only in a "general capacity to sue and be sued in courts of law and equity whose jurisdiction as otherwise defined was appropriate to the occasion, . . ." *Bankers Trust*, 241 U.S. at 305. The Red Cross position, which would find a broad jurisdictional grant in the ambiguous language of the charter, is contrary to this Court's clearly enunciated standards.

This Court first addressed the jurisdictional aspect of sue-and-be-sued clauses in federal charters in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809). There the Court interpreted the charter of the first Bank of the United States. The charter gave the bank the power “to sue and be sued . . . in courts of record, *or any other place whatsoever.*” *Id.* at 85 (emphasis added). The Court held that the plain meaning of this language “is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, . . .” *Id.* Chief Justice Marshall declared that “the right to sue does not imply a right to sue in the courts of the Union, *unless it be expressed.*” *Id.* (emphasis added).

Fifteen years later, in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court construed a similar sue-and-be-sued clause in the charter of the second bank of the United States. Unlike the provision found wanting in *Deveaux*, which did not refer to the jurisdiction of a particular court, the second bank charter expressly provided that the bank shall have the power “to sue and be sued . . . in all courts having competent jurisdiction, *and in any circuit court in the United States.*” 22 U.S. at 816 (emphasis added). Significantly, the circuit courts of the United States were at that time specific courts of original jurisdiction. *See* Act of September 24, 1789, 1 Stat. 73. This reference to a particular court provided the basis for the Court’s finding of a grant of jurisdiction:

[The words of the charter] seem to the Court to admit but one interpretation; they cannot be made plainer by explanation. They give, expressly, the right to “sue and be sued,” “*in every circuit court of the United States,*” and it would be difficult to

substitute other terms which would be more direct and appropriate for the purpose.

*Id.* (emphasis added). This phrase is the minimum language that this Court has ever found to confer jurisdiction.<sup>1</sup>

This Court directly addressed this issue on one other occasion. In *Bankers Trust v. Texas and Pacific Ry. Co.*, 241 U.S. 295 (1916), the language at issue was contained in the charter of the Texas and Pacific Railway. The charter provided that the railway could "sue and be sued, . . . in all courts of law and equity within the United States." 241 U.S. at 302, *citing* Act of March 3, 1871, ch. 122, §1, 16 Stat. 573.

This Court held that the words were not intended in themselves to confer jurisdiction upon any court. 241 U.S. at 303. Significantly, the Court's interpretation of the railroad charter is virtually identical to the text of the Red Cross charter:

[E]vidently all that was intended was to render this corporation capable of suing and being sued by its corporate name *in any court of law or equity -- Federal, state, or territorial* -- whose jurisdiction as otherwise competently defined was adequate to the occasion.

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<sup>1</sup> In subsequent cases, this Court has noted that broad jurisdictional principles articulated in *Osborn* might be questionable. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). This Court has never suggested that *Osborn* be read more expansively, as suggested by the Red Cross.

*Id.* (emphasis added). Compare 36 U.S.C. §2 (Red Cross may sue and be sued "in courts of law and equity, state or federal . . .") Construing the railroad charter in this manner, this Court nevertheless found it to "have been the same generality and natural import" as the insufficient language in *Deveaux*. *Id.* at 304. Accordingly, the railroad charter did not "establish an exceptional or privileged jurisdiction." *Id.* at 305.

The First Circuit correctly noted that the *Bankers Trust* result was influenced in part by the congressional intent behind §5 of the Judiciary Act of January 28, 1915. That Act prohibited the finding of federal jurisdiction solely on the ground that a railroad was incorporated under an Act of Congress. Act of January 28, 1915, ch 22, §15, 38 Stat. 803. In 1925, Congress enacted a similar amendment which applied to all federally chartered corporations. 28 U.S.C. §1349.<sup>2</sup> The First Circuit read *Bankers Trust* and these general congressional limits on federal question jurisdiction to require that "a congressional grant of [original] jurisdiction should not be implied from ambiguous language." 938 F.2d at 1498.

In addition, the court below found the Red Cross charter ambiguous in ways that the second bank charter in *Osborn* was not. Specifically, the Red Cross charter refers to both state and federal courts through the use of the parallel phrase "to sue and be sued in courts of law and equity, State or

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<sup>2</sup> These jurisdiction-limiting statutes were enacted to counter the flood of federal incorporation cases which followed the establishment of general federal question jurisdiction in the Judiciary Act of 1875. Act of March 3, 1875, 18 Stat. 470. See Mishkin, *The Federal "Question" In the District Courts*, 53 Colum. L. Rev. 157, 160 n.24 (1953).



Federal, . . .” *Id.* By contrast, the charter in *Osborn* avoided that vagueness by giving the bank the power to sue and be sued “in all state courts having competent jurisdiction” and second, to sue and be sued “in any circuit court in the United States” (emphasis added). The first phrase plainly assumes that state courts possess competent jurisdiction over the bank so that Congress needed only to grant the capacity to sue. The second phrase, referring to federal courts, does not make that assumption. Accordingly, Congress named a specific federal court of original jurisdiction -- the circuit court -- and did not require an independent basis for appearing in that court, *i.e.* that the court be otherwise “competent.” The absence of that “jurisdictional caveat” and the specific reference to the circuit court “simultaneously confer[red] the power to sue and expand[ed] federal jurisdiction to include such suits.” *Id.* (emphasis added). See also *Anonymous Blood Recipient v. William Beaumont Hosp.*, 721 F. Supp. 139, 144 (E.D. Mich. 1989) (The *Osborn* charter “allowed the bank to litigate in state court with jurisdiction, but allowed the bank to sue in all federal courts, regardless of jurisdiction”) (emphasis in original).

The Red Cross criticizes the First Circuit’s refusal to adopt a formalistic approach. The Red Cross contends that Congress need only recite the magic word “federal” in a congressional charter to confer jurisdiction. Pet. Br. at 23 (“ . . . a sue-and-be-sued clause that refers generally to the federal courts confers federal jurisdiction.”) This is simply not the teaching of *Osborn*. Indeed, as one court accurately observed:

The Red Cross’ interpretation of its charter would also allow it to sue or be sued in a Circuit Court of



Appeals or the Supreme Court, which are also federal courts of law and equity.

... *Osborn* is controlling precedent, but it does not support the Red Cross' argument.

*Boutar v. American National Red Cross*, Civ. No. 90-3155 (HHG), slip op. at 3-4 (D.D.C. April 9, 1991); *See also Walker v. American National Red Cross*, No. 91-0749 (GHR), slip op. at 5 (D.D.C. May 10, 1991). The language in the *Osborn* charter has been considered the "minimum language required" to confer jurisdiction. *Anonymous Blood Recipient v. Sinai Hosp.*, 692 F. Supp. 730, 733 (E.D. Mich. 1988). The language in the Red Cross Charter does not reach that minimum, and this Court should refuse to lower the threshold.

**B. This Court's *D'Oench* Opinion Reinforces the Rule That Original Jurisdiction Should Not Be Inferred From Ambiguous Language.**

The Red Cross asserts that *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942) "proves conclusively that the First Circuit erred." Pet. Br. at 21. This assertion fails for at least two reasons. First, the Red Cross distorts *D'Oench* by claiming that it "represents the only occasion when this Court *has* confronted a sue-and-be-sued clause that referred specifically to the federal courts but not to any particular federal court." Pet. Br. at 21 (emphasis in original). Second, the Red Cross erroneously suggests that *D'Oench* "held" that the congressional grant to sue and be sued in "any court of law and equity, State or Federal" contained in the FDIC Charter was the sole basis for the federal jurisdiction in all cases involving the FDIC.

As a preliminary matter, *D'Oench* did not purport to analyze the FDIC sue-and-be-sued clause in light of *Deveaux*, *Osborn*, and *Bankers Trust*. The Court did not even cite those cases. Accordingly, this Court never considered whether this language standing alone was sufficient to confer original jurisdiction. The Red Cross concedes as much. See Pet. Br. at 23 ("The basis of jurisdiction . . . [was] . . . not the ultimate issue in *D'Oench*."). Instead, the issue before the Court was whether a federal court in a non-diversity case should apply state law or federal common law. *D'Oench* at 455. In holding that federal common law applies, this Court simply observed that federal question jurisdiction, not diversity jurisdiction, was involved. *Id.*<sup>3</sup>

More importantly, the *D'Oench* Court recognized the sue-and-be-sued-clause was not the sole source of jurisdiction. The Court noted that Congress, in another section of the statute, had explicitly provided that suits involving the FDIC raise federal questions. *Id.* at 455 n.2 (citing 17 U.S.C. §264(j)(1940)). Section 264(j) unambiguously states "All suits of a civil nature at common law or in equity to which the Corporation shall be a party *shall be deemed to arise under the laws of the United States* . . ." (emphasis added). The Red Cross dismisses this clarifying language, indicating that its location in a footnote

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<sup>3</sup> While the Court could have questioned jurisdiction on its own, it did not, and the parties never raised the issue. See *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 117 F.2d 491 (8th Cir. 1941). Most likely, 17 U.S.C. §264(j)(1940), discussed below, removed any ambiguity from the sue-and-be-sue clause.

somehow diminishes its import. Pet. Br. at 21.<sup>4</sup> This disregard for §264(j) as the basis for jurisdiction ignores the relevant history of the FDIC.

The First Circuit accurately noted that the Banking Act of 1933 originally provided that the FDIC could sue or be sued "in any court of law or equity, State or Federal." 938 F.2d at 1499 n.5. Significantly, Congress amended the Act in 1935 to add the express and unambiguous language of §264(j) which was quoted by the *D'Oench* Court in footnote 2. The Senate Report further expressed that the purpose of this amendment was to "give jurisdiction, in the case of suits of a civil nature to which the corporation is a party, to courts having jurisdiction of suits arising under the laws of the United States." S. Rep. No. 1007, 74th Cong., 1st Sess. 5 (1935)(emphasis added). "Clearly, if Congress believed that the express power to litigate in federal courts was sufficient to create original jurisdiction in those courts, this amendment would not have been necessary." *Walton v. Howard Univ. Hosp.*, 683 F. Supp. 826, 828 (D.D.C. 1987). See also *Federal Deposit Ins. Corp. v. George-Howard*, 153 F.2d 591, 593 (8th Cir.), cert. den. 329 U.S. 719 (1946)(relying upon the 1935 amendment to confer original jurisdiction in the federal courts).

Amicus suggests that the Red Cross' assertion of a "universally shared assumption in the 1940s (when the Red Cross Charter was amended) that a sue-and-be-sued clause referring to the federal courts confers jurisdiction," Pet. Br.

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<sup>4</sup> But cf. *Collins v. American Red Cross*, 724 F. Supp. 353, 356 (E.D. Pa. 1989)("[A]nything the Supreme Court finds it worthwhile to say should be regarded as meaningful."); see also *Luckett v. Harris Hospital-Fori Worth*, 764 F. Supp. 436, 440 (N.D. Tex. 1991).

at 22, is insupportable and wrong in light of *D'Oench* and the legislative history of the FDIC.

The First Circuit correctly recognized that other enactments amply demonstrate Congress' belief that sue-and-be-sued clauses which merely refer to the federal courts do not confer jurisdiction. 938 F.2d at 1500. *See, e.g.*, Act of Aug. 1, 1947, ch. 440, §7, 61 Stat. 719 (amending the Federal Crop Insurance Corporation Charter to confer jurisdiction in the district courts "without regard to the amount in controversy"); Act of June 29, 1948, ch. 704, §4, 62 Stat. 1070 (in creating the Commodity Credit Corp., Congress provided that district courts "shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation.") The court below logically observed:

Had Congress intended to expand jurisdiction [in the Red Cross Charter], it could easily have adopted the clear and specific language used to create federal jurisdiction common in other charters amended at approximately the same time.

*Id.*

The First Circuit correctly found nothing in *D'Oench* that altered the minimum language described by *Osborn* as necessary to create federal jurisdiction. Accordingly, amicus suggests, it was clear in the 1940s that Congress was required to do more than refer generally to federal courts to confer federal jurisdiction. Nevertheless, Congress did not amend the Red Cross Charter to include an express grant of federal jurisdiction, as it had for the FDIC and other congressionally chartered corporations. The court below properly refused to legislate in Congress' place.

## II. THE LEGISLATIVE HISTORY OF THE 1947 AMENDMENT TO THE RED CROSS CHARTER EVINCES NO CONGRESSIONAL INTENT TO CONFER FEDERAL JURISDICTION.

The Red Cross acknowledges that "the best indication of Congress' intent in amending the Red Cross Charter in 1947 is the words Congress chose and their established meaning at the time." Pet. Br. at 37. As the court below found and as amicus has demonstrated, the words Congress chose in the Red Cross Charter did not meet even the minimum requirements of *Osborn*. By 1947, when the relevant language was added to the Red Cross Charter, Congress clearly knew how to establish federal jurisdiction when it so intended. See *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942). Congress did not do so, and that should end the inquiry.

The Red Cross nevertheless argues that the legislative history behind the 1947 amendment provides a clue to congressional intent which cannot be found in the express language of the charter. The First Circuit properly rejected this contention, finding that the legislative history is "sparse and evinces no clear intent on the part of Congress . . ." 938 F.2d at 1499.

Prior to 1947, the Red Cross had the power to "sue and be sued in courts of law and equity within the jurisdiction of the United States." Act of January 5, 1915, ch. 23, §2, Stat. 600. The 1947 amendment simply added the parallel phrase "state or federal." 36 U.S.C. §2. The Red Cross complains that the First Circuit's interpretation renders the amendment "a nullity." Pet. Br. at 41. Amicus suggests, however, that the more natural reading of the legislative history leads to the



conclusion that Congress was merely reconfirming the Red Cross' capacity to sue in state and federal courts. As this Court has recognized:

Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and to safeguard against misapprehension as to existing law.

*Helvering v. New York Trust Co.*, 292 U.S. 455, 468-69 (1934).<sup>5</sup>

In support of its claim that the 1947 amendment transformed the charter from a mere capacity to sue to an express jurisdictional grant, the Red Cross relies heavily on the Harriman Committee Report. This committee was formed by the Red Cross to advise Congress on procedural changes in the Red Cross Charter. Whatever the intentions of the committee, it is "doubtful that Congress adopted those intentions," since the Senate Report "makes no mention of the jurisdictional point whatsoever." *Roche v. American Red Cross*, 680 F. Supp. 449, 453 (D. Mass. 1988)(citing S. Rep. No. 38, 80th Cong., 1st Sess., reprinted in 1947 U.S. Code Cong. Serv. 1028).

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<sup>5</sup> It is clear that after the *Bankers Trust* case and the enactment of 28 U.S.C. §1349, the Red Cross could only appear in federal court on the basis of diversity or another source of federal question jurisdiction. The corporate charter was not a source of federal question jurisdiction. It was under these circumstances that the clarification was sought.



Even assuming that Congress adopted the Harriman Committee recommendations, the specific recommendation relied upon, No. 22, does not support its cause. The committee requested only that the charter "make it clear" that the Red Cross has the power (i.e., capacity) to sue and be sued in federal courts. Report of the Advisory Committee on Organization (June 11, 1946). Pet. Br. at App. 3a. Indeed, the committee's stated purpose was to *reaffirm* the corporate powers granted by the original 1905 *Deveaux*-like charter:

The Red Cross has in several instances sued in the federal courts, and its power in this respect has not been questioned. However, in view of the limited nature of the federal courts it seems desirable that this right be clearly stated in the charter.

*Id.* at 4a. It is obvious that the committee was not concerned with converting the charter from one which simply grants corporate power (as did the clause in *Bankers Trust*) to one which confers federal jurisdiction (as did the clause in *Osborn*).<sup>6</sup> Rather, it merely sought to "clarify" that which it implicitly had -- the capacity to sue in the federal courts -- if jurisdiction was otherwise adequate.

Nor is there any indication in the Senate hearings on the amendment that Congress intended to confer federal jurisdiction. See *American National Red Cross: Hearing on S. 591 Before Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 7-11 (1947)[hereinafter "*Hearing*"]. To the

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<sup>6</sup> The pre-1947 Red Cross Charter was virtually identical to the charter found not to confer jurisdiction in *Bankers Trust*, 241 U.S. at 302 (the railroad could "sue and be sued . . . in all courts of law and equity within the United States").

contrary, the discussion by Senators White, Connally, and Thompson clearly reflects their interpretation of the provision as a simple grant of corporate power. *Id.* Even Mr. Harriman assured the committee that the amendments affected only "corporate structure," a characterization that was reiterated by committee chairman Senator Vandenberg. *Id.* at 6-7. In spite of the many references to the "power" of the Red Cross to litigate contained in the report, the Red Cross seizes upon a single isolated comment by Senator George that the purpose of the amendment was "to give the jurisdiction in State courts and Federal courts . . ." Pet. Br. at 6, quoting *Hearing* at 10. The Red Cross omits reference to Senator George's explanation of his remark:

. . . there might be some question about the right of a Federal corporation to be sued in a State court. *I thought that was, and I still think it is, the purpose of this provision.*

*Id.* at 11 (emphasis added). Moreover, Sen. George characterized the amendment as "creating a corporation" and granting "the power to sue and be sued here in our courts." *Id.* at 9. One district court has found it "difficult to conclude from the remarks made during the hearing that the Committee intended to cause litigation involving the Red Cross to arise under the laws of the United States, and thereby to expand the original jurisdiction of the federal courts." *Walton v. Howard Univ. Hosp.*, 683 F. Supp. 826, 829 (D.D.C. 1987).

In the First Circuit's view, this legislative history "evinces no clear intent on the part of Congress to confer original jurisdiction." 938 F.2d at 1499. The court found additional support for this conclusion from the sole case

discussing federal jurisdiction and the Red Cross close in time to the amendment. *Patterson v. American National Red Cross*, 101 F. Supp. 655 (M.D. Fla. 1951) held that the charter insured only that the Red Cross could be brought into court under diversity jurisdiction. The First Circuit attached some significance to the fact that the Red Cross in *Patterson* "did not even suggest that the amendment conferred federal jurisdiction." 938 F.2d at 1500.<sup>7</sup> It seems apparent that the argument so strenuously urged by the Red Cross is of recent invention, raised only after persons infected with HIV from blood transfusions began to file claims in the mid-1980's. Amicus suggests that the argument is precisely the type of "lawyerly invention" which the Red Cross -- and this Court -- have justly criticized. See Pet. Br. at 29, citing *K mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 187 (1988).

### III. PUBLIC POLICY DOES NOT SUPPORT FEDERALIZING ALL CASES INVOLVING THE RED CROSS.

Ultimately, the Red Cross relies upon "good reasons to afford the Red Cross a federal forum in all cases." Pet. Br. at 32. Amicus respectfully suggests that these arguments are properly directed to Congress, which alone possesses the plenary power to confer jurisdiction. This Court has long cautioned judges against enacting legislation under the guise

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<sup>7</sup> The Red Cross seeks to discredit *Patterson*, by criticizing the trial judge (who may have "misunderstood the argument") and counsel (who were likely "unpaid volunteers" who neglected to raise the issue out of tactical considerations or "simple ignorance"). Pet. Br. at 40. The fact remains, however, that for nearly four decades neither Congress, nor the courts, nor the Red Cross itself suggested that the charter created federal jurisdiction.

of statutory construction. See *Heiner v. Donnan*, 285 U.S. 312, 331 (1932); *Washington Metropolitan Area Transit Auth. v. Johnson*, 467 U.S. 925 (1984)(Rehnquist, J., dissenting).

Nevertheless, the Red Cross suggests that its important national function entitles it to a presumption of jurisdiction. Pet. Br. at 32-33. It alleges, for example, that the First Circuit's decision will "impede uniformity in resolving the federal questions that will arise repeatedly" in litigation involving the Red Cross. *Id.* at 34. The Red Cross offers no support for its premise that state courts are incapable of handling such questions. Moreover, even the Red Cross concedes that, as a practical matter, at least some of its litigation will "principally involve questions of state law, and it could be argued that those questions should be entrusted to state courts." *Id.* at 35. An instructive case is *Kaiser v. Memorial Blood Center*, 938 F.2d 90 (8th Cir. 1991). There the Eighth Circuit retained jurisdiction under §2 of the Red Cross Charter only to certify a state law question to the Supreme Court of Minnesota.

There are, moreover, countervailing policy considerations associated with conferring original federal jurisdiction. One district court warns:

It could well federalize all Red Cross cases. Not only would the emerging wave of contaminated blood cases be added to the federal dockets but so could every contract dispute between a supplier and Red Cross chapter, as well as personal injury cases involving allegedly defective conditions on Red Cross premises or negligent acts by Red Cross agents and employees, to cite but a few examples.

*Collins v. American Red Cross*, 724 F. Supp. 353, 358 (E.D. Pa. 1989).

Tort law is, essentially, state law, primarily administered and developed by state courts. The Red Cross' contention that "Congress would not have wanted to subject the Red Cross to state-court litigation without its consent" flies in the face of this Court's clearly enunciated respect for state-federal relations. Where federal preemption is asserted, for example, this Court begins with the "basic assumption that Congress did not intend to displace state tort law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Even in a field as heavily regulated by the federal government as nuclear safety, this Court has found that "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

Amicus suggests, however, that questions concerning the scope of the jurisdiction of the federal courts cannot and may not be decided on the basis of public policy or interest balancing. The First Circuit properly resisted the invitation to do so. Noting that its "responsibility as a court is to interpret the law as written," the court held that

[N]either the express language nor the legislative history of the 1947 amendment of §2 establishes that Congress intended to grant the Red Cross access to federal courts for the disposition of cases governed by state law absent some independent basis for federal jurisdiction.

938 F.2d at 1501. This conclusion is amply supported by reason and precedent.

## CONCLUSION

For these reasons, Amicus respectfully urges this Court to affirm the order of the court of appeals.

Respectfully submitted,

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